Nos. 17,058 — 17,059

IN THE

United States
Court of Appeals
For the Ninth Circuit

FOOD MACHINERY & CHEMICAL CORPORATION, a Corporation, operated as WESTVACO MINERAL PRODUCTS DIVISION, and J. R. SIMPLOT COMPANY, a corporation,

Appellants,

vs.

W. S. MEADER and MAY MEADER, husband and wife,

Appellees.

Appeals from the United States District Court for the District of Idaho, Eastern Division

BRIEF OF APPELLANTS

B. W. DAVIS
P. O. Box 1049
Pocatello, Idaho
Attorney for Appellant,
Food Machinery & Chemical Corporation

HAWLEY & HAWLEY
P. O. Box 1617
Boise, Idaho

LLOYD E. HAIGHT
P. O. Box 2777
Boise, Idaho
Attorneys for Appellant,
J. R. Simplot Company

IN THE

United States
Court of Appeals
For the Ninth Circuit

FOOD MACHINERY & CHEMICAL CORPORATION, a Corporation, operated as WESTVACO MINERAL PRODUCTS DIVISION, and J. R. SIMPLOT COMPANY, a corporation,

Appellants,

vs.

W. S. MEADER and MAY MEADER, husband and wife,

Appellees.

Appeals from the United States District Court for the District of Idaho, Eastern Division

---

BRIEF OF APPELLANTS

B. W. DAVIS
P. O. Box 1049
Pocatello, Idaho
Attorney for Appellant,
Food Machinery & Chemical Corporation

HAWLEY & HAWLEY
P. O. Box 1617
Boise, Idaho

LLOYD E. HAIGHT
P. O. Box 2777
Boise, Idaho
Attorneys for Appellant,
J. R. Simplot Company

SUBJECT INDEX

TABLE OF AUTHORITIES CITED
CASES

STATUTES AND REGULATIONS

TEXTS

IN THE

United States
Court of Appeals
For the Ninth Circuit

FOOD MACHINERY & CHEMICAL CORPORATION, a Corporation, operated as WESTVACO MINERAL PRODUCTS DIVISION, and J. R. SIMPLOT COMPANY, a corporation,

Appellants,

vs.

W. S. MEADER and MAY MEADER, husband and wife,

Appellees.

Nos. 17,058
17,059

Appeals from the United States District Court for the District of Idaho, Eastern Division

---

BRIEF OF APPELLANTS

I
SUMMARY STATEMENT OF THE CASE, JURISDICTION, PLEADINGS AND PROCEEDINGS

On January 31, 1957, W. S. Meader and May Meader, husband and wife, the Appellees, then plaintiffs, filed a complaint in the United States District Court for the District of Idaho, Eastern Division, against Food Machinery & Chemical Corporation,

operated as Westvaco Mineral Products Division, a corporation, and J. R. Simplot Company, a corporation, Appellants, then defendants, to recover damages for loss to their trout hatchery, trout eggs and property, allegedly resulting by reason of the operation by Appellants of their industrial plants near Pocatello, Idaho. The complaints were based upon the theory of nuisance. (R. 3-9, Vol. I, No. 17058; R. 3-9, Vol. I, No. 17059)

The separate complaints alleged Appellees were citizens of the State of Idaho; that Food Machinery & Chemical Corporation was a Delaware corporation qualified to do business in the State of Idaho; that J. R. Simplot Company was a Nevada corporation qualified to do business in the State of Idaho; and in each complaint that the matter in controversy, exclusive of interest and costs, exceeded the sum of $3,000.00

An answer was filed by Appellant Food Machinery & Chemical Corporation (R. 12-14) and an amended answer (R. 15-18m, Vol. I, No. 17058) and an answer by J. R. Simplot Company was filed. (R. 15-19, Vol. I, No. 17059)

The District Court had jurisdiction, pursuant to Section 1332, Chapter 28, U.S.C.A. The cases were consolidated for trial, and they were tried before a jury and judgment entered against the defendants April 23, 1959. (R. 71-72)

Appellants filed notice of appeal. (R. 88, Vol. I, No. 17058; R. 66, Vol. I, No. 17059) Supersedeas

bonds were filed and approved by the District Judge. (R. 88-90, Vol. I, No. 17058; R. 67-69, Vol. I, No. 17059)

This Court has jurisdiction of these appeals pursuant to Title 28, Sections 1291 and 1294, U.S.C.A., and under Rule 73, Federal Rules of Civil Procedure. Pursuant to Stipulation entered into between counsel and the Order of the Chief Judge, United States Circuit Court of Appeals, Ninth Circuit, the several appeals were consolidated, with a single record required, and the Appellants permitted to file a consolidated brief on appeal. (R. 77-78, Vol. I, No. 17059)

II
STATEMENT OF FACTS

Appellees sought relief upon the theory of a private nuisance damaging to their property. The allegations of their complaints can for all practical purposes be considered as identical, it being alleged that Appellant Food Machinery & Chemical Corporation operated its manufacturing plant in the production of phosphorus and that Simplot operated its in the production of acids and fertilizers.

Appellees allege that gases and particulates from Appellants' plants were deposited upon their real estate and upon the ponds of water on the same, which waters and springs were used in the operation of a commercial fish hatchery business. That the commercial trout hatchery business was impaired

and damaged, and the natural vegetation on the premises was damaged, injuring and killing their fish and reducing the quantity and quality of trout eggs produced by the breeding stock of trout owned by the Meaders.

Appellants' answers in general raised the same defenses, denying any damage or injury of any kind to the Appellees' fish or property, and alleged Appellants were and are operating lawful businesses in a lawful manner.

Appellees alleged a wilful and knowing disregard of their rights by each of the defendants and prayed for $50,000.00 punitive damages and $200,000.00 general damages against each. The Court on its own motion refused to receive evidence on the question of punitive damage. (R. 857)

Appellees established that their trout hatchery had been operating for several years prior to the installation of the plants of Food Machinery & Chemical Corporation in the latter part of the year 1949 and the installation of Simplot's plant in about the year 1944; that they had, generally speaking, been operating their hatchery and trout farm as an egg taking station which was their principal business during the times alleged in their complaint and shortly prior thereto.

Appellees established by their income reports that their profits for the operation of their business were considerably less for the years 1953, 1954 and 1956 than those for the seven years prior to the year 1953,

but that their profits in the year 1955 were much greater than for any of the years from 1946 to 1956, inclusive.

The testimony of Appellees and their lay witnesses established greater fish loss in the years 1953, 1954, 1955 and 1956, than in other years; that they lost more trout eggs and were unable to fill their trout egg orders as formerly; that they had extraordinary losses of trout and trout eggs.

Appellees showed that smoke and dust at times from Appellents' plants settled and hung over the waters at the Meader Hatchery; that this had not happened before; that the Meaders could not account for their loss; that they noticed a greater loss of trout and trout eggs after rains, winds and when the smoke from the two plants hung over the waters, at which times the loss of trout was then extremely heavy; that it was extremely heavy in 1955 and 1956; that the hatchery lost its value as an egg taking plant and that this situation existed on the date of the sale of the hatchery for $200,000.00 in 1956. Their income reports show the following profits and losses for the years 1946 to 1956, inclusive: (R. 454, Appellees' Exhibit 15)

1946	$ 9,692.96 profit
1947	13,513.54 profit
1948	27,707.88 profit
1949	19,718.22 profit
1950	19,011.18 profit
1951	21,474.94 profit

1952	12,144.19 profit
1953	1,492.90 loss
1954	954.13 profit
1955	48,607.45 profit
1956	2,384.18 profit to June

Appellees' expert testified that a constant level of 4.5 to 20 ppm soluble fluoride would likely result in the damage to trout and trout eggs; that out of 12 samplings taken by Food Machinery & Chemical Corporation in the year 1953, only one showed a content of 4.7 ppm, with an average of .5 ppm for the 12 samplings; that a total of 48 samples were taken in 1953, with only the one showing 4.7 ppm; that with respect to the 4.7 ppm sample there is no proof of the date of the sampling, and there is no other supporting proof as to the length of time the water remained in such condition, and no proof as to whether or not it was before or after the spawning season; that there was one sampling of vegetation in 1951 on the Malcolm Martin farm adjacent to the Meader Fish Hatchery showing a content of 300 ppm, and one sampling of leaves in 1954 at the Meader Hatchery showing content of 137 ppm; that the discharge in pounds per day by Appellants of effluent in the way of fluoride was as follows:

Food Machinery & Chemical Corporation		J. R. Simplot Company	
1949	1700	1949	Unknown
1950	1700	1950	Unknown
1951	3300	1951	Unknown

1952	3300	1952	Unknown
1953	6500	1953	484
1954	3100	1954	110
1955	600	1955	190
1956	600	1956	190
1957	600	1957	125
1958	600	1958	100

Meaders' hatchery is approximately two miles northerly from Appellants' plants. Appellees' Exhibits 25, 26 and 27, reports of the University of Idaho for the years 1955, 1956 and 1957, show and prove conclusively from a complete water survey of the area, including the Meader Hatchery, that the waters in the area showed a low fluoride content, with no contamination; that a comparison of the samples analyzed by the University of Idaho in their surveys with those taken previously by Dr. Greenwood (Exhibit 17) and Dr. Wohlers show no material change in the fluoride content of the water prior to and following the year 1955.

Appellees' Exhibits 1 to 9; 25, 26 and 27 show a difference in the parts per million of fluoride on vegetation in the area before and after the year 1955, but none insofar as running water or any water in the area was concerned.

The record discloses, and the evidence is uncontradicted, that neither the fish, nor the fish eggs suffered from fluorosis; that they did not evidence any signs of damage from fluoride. The uncontradicted testimony is that when Warren Meader no-

ticed a heavy loss of fish he telephoned Dr. Henry C. Wohlers, a senior chemist in the employ of Stanford Research Institute, Menlo Park, California, which Institute was a non-profit research organization investigating the fluoride situation in the Pocatello area at the request of Food Machinery & Chemical Corporation (R. 993-994); that Wohlers took some of the fish and the leaves from the willow trees, analyzed both, gave the results to Meader; that the analyses of whole fish did not show a fluorine content that was in any way damaging to trout; that leaves falling from the trees, if all in that particular area had fallen into the moving water, could not have added any appreciable amount of fluoride to the water. (R. 1008-14)

It is undisputed that fluorapatite, the substance emanating from Appellants' plants, if poured into the water in tons would not increase the fluorine content in any appreciable amount due to its insolubility; that any gaseous fluoride permeating the leaves on the trees at Meader Fish Farm could not have possibly affected the waters.

One of the exhibits recovered from the Meaders and produced by them, but introduced by Appellants, showed an average fluoride vegetation concentration on the Meader Fish Farm of not exceeding some 40 ppm, and one sample as low as 7 ppm.

Ninety-six samplings of Meader Hatchery water, including those made by the University of Idaho, those by Dr. Greenwood for Meaders and those made

by Stanford Research, Food Machinery & Chemical Corporation and Simplot Company, showed an average of less than 1 ppm of fluoride for the years covered by Meaders' complaint.

A water sampling taken from the mine from which defendants received their phosphate shale, where the fluoride content is as high as 33,000 ppm showed a fluoride content of less than 1 or 2 ppm. (Appellants' Exhibits 30-31, R. 946, 985)

The testimony of Dr. Wohlers and Dr. Wood is absolutely uncontradicted that the fish and the fish eggs were not affected by or damaged by fluorine or fluoride. (R. 1009, 1067-71)

The uncontradicted testimony and proof of both Appellees and Appellants is that fish die from many different causes; that they are called "shorttails"; that they are called "cripples," and that there are a great many losses of fish in every hatchery. The witness, Nelson, a son-in-law of the Meaders, estimates the total normal loss from the time eggs are placed in the hatchery until the fish are reasonably mature to be 40% to 60%. The symptoms of the fish that died prior to the erection of the defendants' plants were the same as those that died after. (R. 781-782, 784)

Counsel for Meaders, at a preliminary hearing advised the Court:

> "A slight change in the temperature of the water can cause a heavy loss of fish." (R. 123)

All the defense testimony is consistent with the

direct testimony of the Meaders and there is no conflict as to the cause of the loss of fish by death or of fish eggs not properly hatching.

The Appellees secured the services of Dr. Greenwood, a recognized expert; they secured the services of Dr. Ziegler, Dr. Gate, Dr. Weise and Dr. E. O. Leonard, none of whom were asked for an opinion as to what caused the loss of plaintiffs' fish or fish eggs.

Dr. Wohlers testified, positively, that the amounts of fluoride discharged by the plants of the Appellants had no bearing on the question of damage to trout because the content of fluoride in the water at the Meader Hatchery was known; he further testified positively that inversion as discussed by the Appellees, and which had to do with atmospheric conditions, considering the effluent from the plants, would not affect the fluorine content of Meaders' waters. (R. 1045)

All of the waters, soil, vegetation and air in the vicinity of the Hatchery and the industrial plants contains normally certain amounts of fluoride: The waters from .3 to 1.1 ppm; the soil, 500 ppm; and the vegetation 5 to 20 ppm. (R. 966) The amount of fluoride in the air is constant in minute quantity at all times.

No tolerance by trout to fluoride has been scientifically established, and no standard was suggested by Meaders except the testimony of Dr. Gale as to the effect upon the cells of trout when directly and

constantly exposed to fluoride by ingestion. Dr. Gale specifically stated that his estimate did not apply to flowing water or to any water at all. (R. 286 and 310)The record and testimony of this witness is specifically set forth and identified in the argument.

It is undisputed that the trout eggs in the hatchery troughs were supplied with water from a spring flowing directly out of soil that contained naturally 500 ppm fluorine; that this water as it went into the hatchery troughs where the eggs were taken care of was mixed with water taken from one of the ponds that contained fish and in which fish were fed and that the troughs received water in the amount of 50% from the spring that was piped directly to the hatchery building and 50% from water piped into the hatchery building from the pond containing trout. (R. 767)

It was definitely established by the Meaders' evidence that eggs brought to the hatchery from other localities and from other hatcheries did not produce any better than the eggs taken by Meaders from their own spawners. (R. 591)

Meaders secured the services of Drs. Greenwood and Ziegler of the University of Utah in analyzing and studying their problem. Dr. Greenwood is a recognized authority in the fluoride field. These experts visited the Meader property, made analyses of trout and of the water at the fish hatchery and Dr. Leonard analyzed the water.

Food Machinery & Chemical Corporation employ-

ed the services of Stanford Research Institute in studying the problem at the Meader Hatchery and cooperated with the Meaders in every respect in trying to ascertain the cause of the trouble at the hatchery, but were finally told their services were not wanted. (R. 642-649, 659, 1006)

The wind direction, as shown by the weather reports, was from 10% to 12% of the time in the direction of the Meader property from the Food Machinery & Chemical Corporation plant and about 5% of the time from the Simplot Company plant. It is plain that no fluoride from the plants could have reached the Meader property except when carried by wind a distance of a mile and one-half to two miles. (Appellants' Exhibit 29)

It is undisputed that Food Machinery & Chemical Corporation spent $125,000.00 with Stanford Research Institute alone in studying the fluoride problem; that it was friendly with the Meader family, did everything to assist in determining the cause of their trouble at the Hatchery, offered to employ an ichthyologist or fish pathologist to come for a week's time, (R. 1006) but Warren Meader refused this offer.

However, after it was established that fluoride was not the cause of the trouble at the hatchery, Meaders sold the property for $200,000.00, and then suit was filed. (Appellees' Exhibit No. 13, R. 447)

III

STATEMENT OF THE ISSUES

Stated as concisely as possible, Appellants urge reversal of the judgment of the District Court for the following reasons:

1. The evidence is wholly insufficient to justify the verdict in that:

(a) The suit being predicated on the theory of private nuisance, and not negligence, there is no evidence that defendants' operations constituted such private nuisance to the business conducted by the plaintiffs.

(b) There is no evidence to establish a causal relationship between the fluoride emissions of defendants' plants, and any damage to plaintiffs' trout and trout eggs, the evidence affirmatively disclosing to the contary.

(c) The verdict of the jury, being unsupported by evidence of damage, was contrary to law and the evidence, and is so excessive that it obviously was the result of passion and prejudice.

2. The jury in returning its verdict disregarded positive, convincing and uncontradicted testimony of reliable, expert witnesses, whose testimony was neither discredited nor impeached, and which testimony was related to complex scientific matters of

inquiry beyond the realm of common or judicial knowledge or lay experience.

3. Certain errors in the admission and exclusion of evidence on the part of the trial court, and errors in the granting and refusal to grant certain instructions to the jury, are detailed in the Specifications of Error and in the Argument sections of this brief.

Appellants urge that all of the above are clearly established by the record in this case.

IV

SPECIFICATIONS OF ERROR

I

The Court erred in denying Appellants' motions for dismissal at the close of Appellees' case for the reasons stated in said motions. (R. 916-927, Vol. IV)

II

The Court erred in denying Appellants' motions for dismissal renewed at the close of Appellees' case for the reasons stated in said motions. (R. 1108-1109)

III

The Court erred in denying Appellants' motions for a directed verdict in favor of Appellants considered

at the time of motion for dismissal at the close of the case, (Clerk's Minutes, R. 69, Case 17058) to-wit:

> "Both defendants, J. R. Simplot Company and Food Machinery & Chemical Corporation renewed their motion for a directed verdict. Motion denied."

for the reasons set forth in both the motions for dismissal and the renewal of said motions, Specifications of Error I and II, supra, and for the further reason that Appellees failed to prove or show any causal connection between the emission of fluoride from Appellants' plants and the loss of trout and trout eggs.

IV

The Court erred in denying Appellants' motions for judgment notwithstanding the verdict for the reasons specifically set forth in said motions. (R. 75-82, Vol. I, Case 17058 as shown by the Court's order R. 87-88, Vol. I, Case 17058)

V

The Court erred in its refusal to give Appellants' requested Instruction No. 15, (R. 1125-1126) as follows:

> "You are instructed that if you consider the net profits received by the plaintiffs, on a yearly basis, in determining rental or use of the prem-

ises, you should deduct from such net profits a reasonable amount of salary for the plaintiffs."

for the reason that said instruction clearly stated the law and the refusal to give the same was objected to. (R. 1125)

VI

The Court erred in its refusal to give Appellants' requested Instruction No. 8, as follows:

"You are instructed that the defendants, or either of them, cannot be held liable unless as reasonable and prudent persons they were in possession of information or knowledge, or should have had such information and knowledge, that the plaintiffs' trout or trout eggs were likely to be damaged by their plant operations."

(R. 43, Vol. I, Case 17058, objection having been made to the Court's refusal, R. 1125)

VII

The Court erred in its refusal to give Appellants' requested Instruction No. 31, as follows:

"You are instructed that the burden is on the plaintiffs to show a fluorine content in their hatchery water that has been proven to be damaging to fish or fish eggs, and that plaintiffs' witness, Dr. Gale, fixed the amount of 3 ppm of fluorine as a level that could be maintained as a steady level and not be damaging, and that un-

less the plaintiffs have proven to your satisfaction by a preponderance of the evidence that a greater amount than this was maintained in the waters of the plaintiffs, that they cannot recover." (R. 67, Vol. I, Case 17058)

The refusal to give said instruction was objected to, (R. 1125) said instruction not only correctly stating the law but was based upon the only testimony in the record that attempted to fix a level of fluorine that could be maintained safely for trout and was based upon the most favorable testimony by Appellees' expert witness, Dr. Gale.

VIII

The Court erred in its refusal to give Appellants' Instruction No. 2, as follows:

"You are instructed that before you can return a verdict for the plaintiffs in this case you must first find that the defendants' plants were a nuisance, as the term has been defined, to the operation of the plaintiffs' fish hatchery." (R. 40, Vol. I, Case 17058)

The Court's refusal to give said instruction was objected to. (R. 1125, Vol. IV) Appellees' case was based entirely upon the theory of nuisance and the Appellants were entitled to said instruction.

IX

The Court erred in overruling the objections to the introduction of Appellees' Exhibits 1 to 9 inclu-

sive, (R. 927-928, Vol. IV) the Exhibits consisting of records of Food Machinery & Chemical Corporation that were given to counsel for Appellees and upon which Witness Kass was examined and cross-examined by counsel for Appellees. (R. 182-258, Vol. II) All of the information that was competent was testified to directly by the witness and all of the facts concerning notices or information that Food Machinery & Chemical Corporation had with reference to fluorine was brought out in the testimony of said witness. In addition, counsel for Food Machinery & Chemical Corporation offered to consent to an instruction covering the matter. (R. 848-856) The Exhibits contained irrelevant, prejudicial and objectionable statements and could only have been relevant on the theory of unlawfulness and punitive damage. The Court having held that Meaders were not entitled to punitive damage should not have permitted the introduction of the exhibits for the reasons given in the objections. (R. 173-176, 180-181)

X

The Court erred in permitting the cross-examination of Witness Kass as to Exhibits 1 to 9 inclusive after they had been marked and before they were admitted in evidence. (R. 182-258, Vol. II) The cross-examination of the witness on said Exhibits prior to their being admitted in evidence was objected to. (R. 201)

XI

The Court erred in sustaining an objection to Ap-

pellants' Exhibit 20 after the same had been admitted in evidence, (R. 1014-1019) the exhibit being a letter from one Drew to Phil Meader admissible for impeachment purposes, the proper foundation having been laid and the exhibit having been properly and correctly indentified. (R. 618-620)

XII

The Court erred in admitting Appellees' Exhibit 22 over objection, for the reason the same were not properly identified nor were proper foundations laid. (R. 660-668)

XIII

The Court erred in refusing to grant judgment notwithstanding verdict on motions of Appellants on grounds 6 and 7 of said motion, (R. 78, Vol. I, Case 17058) for the reason that the jury's verdict was excessive and was not related to any amount of damage that could have been awarded under the evidence and on the grounds that the verdict was given and damage assessed under the influence of passion, caprice or sympathy. The income reports as set forth in the statement of facts herein and the fact that Appellees made a profit of over $48,000.00 in the year 1955, shows conclusively that the verdict of the jury was in excess of any amount that could have properly been allowed.

XIV

The Court erred in sustaining the objection to Appellants' Exhibit 35 and in refusing to permit the

same to be received in evidence. (R. 988-990) This exhibit was produced by counsel for Appellees under an agreement made at the taking of the deposition of Warren Meader and is the result of an analysis of water sampling for fluorine content taken at the Meader Hatchery involving the years in question. It was in Appellees' possession and was competent in every respect and its rejection was prejudicial to the Appellants.

V

SUMMARY OF ARGUMENT AND AUTHORITY

A. APPELLEES HAVE UTTERLY FAILED TO SUSTAIN THEIR REQUIRED BURDEN OF PROOF IN ESTABLISHING A CAUSAL CONNECTION BETWEEN THE FLUORIDE EMISSIONS FROM APPELLANTS' PLANTS AND THE ALLEGED DAMAGE TO THEIR TROUT AND TROUT EGGS. FURTHER, THERE IS NO SUBSTANTIAL EVIDENCE THAT THE ALLEGED LOSS OF PROFITS BY APPELLEES WAS CAUSED IN ANY WAY OR CONTRIBUTED TO BY ANY CONDUCT OF APPELLANTS. FURTHER, THE EFFECT OF FLUORINE ON TROUT OR TROUT EGGS BEING A MATTER BEYOND COMMON KNOWLEDGE OF THE JURY OR JUDICIAL KNOWLEDGE OF THE COURT, SCIENTIFIC PROOF AND EXPERT TESTIMONY WAS A NECESSITY TO ESTABLISH SUCH CAUSE AND EFFECT.

20 *Am. Jur., Evidence,* Sec. 1207-1208

20 *Am. Jur.,* 111, Sec. 97

20 *Am. Jur.,* 133, Sec. 130

Adams v. Cloverdale Farms, (Ore.) 167 P. 1015

Arvidson v. Reynolds Metal Co., 125 F. Supp. 481, 236 F. 2d 224

Chapman v. Title Ins. & Trust Co., (Cal.) 158 P. 2d 42

Christensen v. Northern State Power Co., of Wisconsin, 25 N.W. 2d 659

City of Bethany v. Municipal Securities Co., (Okla.) 274 P. 2d 363

Crawfordsville v. Borden, 28 N.E. 849

DeGarza v. Magnolia Petro. Co., (Texas) 107 S.W. 2d 1078

Dixon v. Southern Pacific Co., 172 P. 368, Syllabus 5

Elam v. Loyd, 201 Okla. 222, 204 P. 2d 280

Erekson v. U. S. Steel, 260 F. 2d 423

Fitzpatrick v. Public Service Co., 131 A. 2d 634

Hagey, et al v. Allied Chemical & Dye Corp., (Cal.) 265 P. 2d 86

Hepner v. Quapaw Gas Co., (Okla.) 217 P. 438

Inter-Ocean Oil Co. v. Marshall, 26 P. 2d 399

Jackson v. Clark, 264 P. 2d 727

Lukenbill v. Longfellow Corp., 329 P. 2d 1036

Magnolia Petro. Co. v. Davis, (Okla.) 146 P. 2d 597

Magnolia Petro., et al v. Dexter, (Okla.) 57 P. 2d 1155

McNealy v. Portland Tractor Co., 327 P. 2d 410

Ogden v. Baker, (Okla.) 239 P. 2d 393

Oklahoma Natural Gas Co. v. Graham, 111 P. 2d 173

Parton v. Weillman, 158 N.E. 2d 719

Prest-O-Lite Co., Inc. v. Howery, (Okla.) 37 P. 2d 303

Reynolds v. Yturbide, 258 F. 2d 321

Richardson v. Parker, (Okla.) 235 P. 2d 940

St. Louis v. Firestone, 130 A. 2d 317

Shell Petro. Corp. v. Worley, 185 Okla. 265, 91 P. 2d 679

Sun-Ray Corp. v. Burge, 269 P. 2d 783

Teeter v. Municipal City of LaPorte, Ind., 139 N.E. 2d 158

Webber, et ux v. Pacific Power and Light, (Wash.) 242 P. 1104

Whitney v. Olson, (Okla.) 218 P. 2d 899

Wiggins v. Industrial Accident Board, 170 P. 9, Syllabus 3

Williams, et al v. Gulf Oil Corp., et al, 107 P. 2d 680

Winterberg v. Thomas, (Colo.) 1058 246 P. 2d

Wirz v. Wirz, 214 P. 2d 839, 15 A.L.R. 2d 1129

B. NEITHER THE COURT NOR JURY CAN IGNORE OR DISBELIEVE THE POSITIVE, UN-

CONTRADICTED TESTIMONY OF WITNESSES NOT IMPEACHED NOR DISCREDITED, AND A FACT CANNOT BE ESTABLISHED AS SUCH THROUGH CIRCUMSTANTIAL EVIDENCE WHEN THE SAME IS INCONSISTENT WITH DIRECT, UNCONTRADICTED, RELIABLE, UNIMPEACHED TESTIMONY THAT SUCH FACT DOES NOT EXIST.

20 *Am. Jur., Evidence*, Sec. 1189

20 *Am. Jur.*, Sec. 1207-1208

32 *C.J.S., Evidence*, Sec. 1039

Albrethsen v. Wood River Land Co., 40 Idaho 49, 231 P. 418

Aranguena v. Triumph Min. Co., 63 Idaho 769, 126 P. 2d 17

Beaver v. Morrison-Knudsen Co., 55 Idaho 275, 41 P. 2d 605

Bennett v. McCready, 356 P. 2d 712

Esso Standard Oil Co. v. Stewart, 59 S.E. 2d 67, 18 A.L.R. 2d 1319

First Trust & Sav. Bank v. Randall, 59 Idaho 705, 89 P. 2d 741

Kellar v. Sproat, et al., 35 Idaho 273, 205 P. 894

Odberg's Estate, 67 Idaho 447, 182 P. 2d 945

Peters v. Sacramento City Employees' Retirement System, 80 P. 2d 179

Pierstorff v. Gray's Auto Shop, 74 P. 2d 171

Quaker Oats v. Davis, 232 S.W. 2d 282

Sanderson's Case, 224 Mass. 558, 113 N.E. 355

Splinter v. City of Nampa, 256 P. 2d 215, Syl-

labus 1 to 3, inclusive, Idaho

Summerville v. Sellers, 94 S.E. 2d 69

Suren v. Sunshine Mining Co., 58 Idaho 101, 70 P. 2d 399

Thalheirner Brothers v. Buckner, 76 S.E. 2d 215

Thibadeau v. Clarinda Cooper Mining Co., 47 Idaho 119, 272 P. 254

William Simpson Const. Co., etal v. Industrial Accident Commission of California, etal, (Cal.) 240 P. 58

Williams v. Ford, 104 S.E. 2d 378

Wirz v. Wirz, 214 P. 2d 839, 15 A.L.R. 2d 1129

C. AT THE TIME OF TRIAL APPELLEES HAD IN THEIR POSSESSION REPORTS AND WATER ANALYSES OF VARIOUS SCIENTISTS EMPLOYED BY THEM TO MAKE SUCH REPORTS AND ANALYSES, AND APPELLEES' FAILURE TO MAKE SUCH EVIDENCE AVAILABLE OR TO PRODUCE THE SAME AT THE TIME OF TRIAL RAISES THE PRESUMPTION THAT THE TESTIMONY OF SUCH EXPERTS AND SUCH REPORTS AND ANALYSES WAS UNFAVORABLE TO THEIR CASE. THE FAILURE OF APPELLEES TO ELICIT FROM SAID EXPERTS OR FROM THEIR WITNESSES WIESE AND GALE THE CAUSE OF THE CONDITION IN THEIR TROUT AND TROUT EGGS WITH RESPECT TO DAMAGE BY FLUORINE RAISES THE PRESUMPTION THAT THE ANSWERS THERETO WOULD HAVE BEEN UNFAVORABLE TO THEIR CASE.

20 *Am. Jur.* 145, Sec. 140

20 *Am. Jur.* 188, Sec. 183

20 *Am. Jur.* 192, Sec. 187

Galloway v. U. S., 319 U.S. 372, 63 Sup. Ct. 1077, 87 L. Ed. 1458

D. THE JURY SHOULD HAVE BEEN INSTRUCTED THAT IF ANY DAMAGES WERE ALLOWED APPELLEES FOR A LOSS OF PROFIT FROM THEIR HATCHERY AND TROUT EGG BUSINESS, A REASONABLE REDUCTION BY WAY OF SALARY FOR SAID PERSONS SHOULD HAVE BEEN MADE IN ARRIVING AT THE AMOUNT OF SUCH DAMAGES.

15 *Am. Jur.*, *Damages*, Sec. 158

25 *C.J.S. Damages*, Sec. 90, Page 633, Footnote 99

Buck v. Mueller, 351 P. 2d 61

Columbus Mining Co. v. Ross, (Ky.) 290 S.W. 1052

Maddox v. International Paper Co., (La.) 47 F. Supp. 829

Molyneux v. Twin Falls Canal Co., 54 Idaho 619, 35 P. 2d 651

People v. San Francisco Savings Union, (Cal.) 13 P. 2d 498

E. THE MERE FACT THAT A DEFENDANT IS GUILTY OF SOME WRONGFUL ACT OR OF COMMITTING A NUISANCE, IF SUCH FACT IS

FOUND, DOES NOT ESTABLISH LIABILITY ON SAID DEFENDANT.

Cook v. Seidenverg (Wash.) 217 P. 2d 799

Eckerson v. Ford's Prairie School Dist. No. 11 of Lewis County, 3 Wash. 2d 475, 101 P. 2d 345

Sheridan v. Deep Rock Oil Co., (Okla.) 205 P. 2d 276

F. APPELLANTS HAVING FULLY MET AND REBUTTED ANY AND ALL LEGAL PRESUMPTIONS THAT EXISTED IN FAVOR OF APPELLEES, THE BURDEN OF PROOF SHIFTED BACK TO APPELLEES AND THE SAME WAS NOT SUSTAINED.

20 *Am. Jur.* 137, Sec. 134

20*Am. Jur.* 169, Sec. 164

20*Am. Jur.* 248, Sec. 256.1

First National Bank v. Ford, (Wyo.) 216 P. 691, 31 A.L.R. 1441

G. IT IS APPARENT THAT THE FLUORIDE EMISSIONS PER DAY FROM APPELLANTS' PLANTS BORE NO RELATION TO THE FLUORIDE LEVEL IN THE MEADER WATERS, NOR TO THE DAMAGE TO TROUT OR TROUT EGGS, THE 1955-1956 LOSSES BEING IDENTICAL TO THOSE IN 1953 AND 1954.

FURTHER, THE SURVEYS OF THE UNIVERSITY OF IDAHO INTRODUCED IN EVIDENCE ESTABLISHED CONCLUSIVELY THE

UTTER LACK OF CONTAMINATION OF THE MEADER WATERS BY FLUORINE.

IT IS FURTHER APPARENT THAT SINCE FROM THE RECORD THE APPELLEES SUSTAINED NO LOSS OF PROFITS IN THE YEAR 1953, IT BEING SHOWN THAT THE NET PROFIT TO THE HATCHERY IN THAT YEAR WAS THREE TIMES THE AMOUNT OF PROFIT IN ANY PRIOR YEAR, THE VERDICT OF THE JURY MUST HAVE BEEN BASED ON LOSS OF PROFITS FOR THE YEARS 1954, 1955 AND 1956. THE EVIDENCE AFFIRMATIVELY DISCLOSES DURING THE LATTER THREE YEARS NOT ONE WATER SAMPLE OR OTHER EVIDENCE THAT SAID WATERS AT THE HATCHERY CONTAINED FLUORIDE IN ANY AMOUNTS DAMAGING TO TROUT OR TROUT EGGS.

Exhibits 25, 26 and 27, reports from the University of Idaho.

H. APPELLEES WHOLLY FAILED TO ESTABLISH THE APPELLANTS MAINTAINED A PRIVATE NUISANCE WITH RESPECT TO APPELLEES' TROUT AND TROUT EGG BUSINESS.

Amphitheatres, Inc. v. Portland Metals, 198 P. 2d 847

Ebur v. Alley Metal Wire Co., 155 A. 280

Fritz v. E. I. DuPont, de Nemours & Co., 75 A. 2d 255

Kelly v. National Lead Co., 210 S.W. 2d 728

Koseris v. J. R. Simplot Co., _____Idaho _____, 352 P. 2d 235

McNichols v. J. R. Simplot Co. (1953), 74 Idaho 321, 262 P. 2d 1012

Peck v. Newburg Light, Heat & Power, 116 N. Y. S. 433

Washchak v. Robt. Y. Moffatt, et al, 109 A. 2d 310, 54 A.L.R. 2d 748

I. THE ADMISSION BY THE TRIAL COURT OF CERTAIN DOCUMENTARY EVIDENCE OVER APPROPRIATE AND VALID OBJECTION OF APPELLANTS, AND THE REJECTION BY THE TRIAL COURT OF CERTAIN DOCUMENTARY EVIDENCE OFFERED BY APPELLANTS WAS HIGHLY PREJUDICIAL AND CONSTITUTED REVERSIBLE ERROR.

VI

ARGUMENT

A. APPELLEES HAVE UTTERLY FAILED TO SUSTAIN THEIR REQUIRED BURDEN OF PROOF IN ESTABLISHING A CAUSAL CONNECTION BETWEEN THE FLUORIDE EMISSIONS FROM APPELLANTS' PLANTS AND THE ALLEGED DAMAGE TO THEIR TROUT AND TROUT EGGS. FURTHER, THERE IS NO SUBSTANTIAL EVIDENCE THAT THE ALLEGED LOSS OF PROFITS BY APPELLEES WAS CAUSED IN ANY WAY OR CONTRIBUTED TO BY ANY CONDUCT OF APPELLANTS. FURTH-

ER, THE EFFECT OF FLUORINE ON TROUT OR TROUT EGGS BEING A MATTER BEYOND COMMON KNOWLEDGE OF THE JURY OR JUDICIAL KNOWLEDGE OF THE COURT, SCIENTIFIC PROOF AND EXPERT TESTIMONY WAS A NECESSITY TO ESTABLISH SUCH CAUSE AND EFFECT.

We submit that Appellees have utterly failed to sustain their required burden of proof in establishing a causal relationship between the emission of fluorides from the plants of the Appellants, and the damage to their trout and trout eggs. Since we are here dealing with a complex matter requiring scientific proof, i.e. the effect of fluorine on trout and trout eggs, the burden was upon Appellees to establish by the testimony of experts or other scientific proof the damage was so caused. We submit the testimony of the experts on both sides of this lawsuit is compatible and uncontradictory and affirmatively proves that the damage to the trout and trout eggs was in fact in no way attributable to the emission from the Appellants' plants. From the state of the record, in the total absence of proof of cause and effect the judgment can be based only upon guess, conjecture and surmise.

Magnolia Petroleum Co. v. Davis, (Okla.) 146 P. 2d 597, was an action to recover damages for pollution of a stream due to salt water escaping from oil and gas wells. Judgment for the plaintiff was reversed on appeal. It was claimed that fish died as a result

of salt in the water and that trees were killed therefrom. We quote the following:

> "The above conclusion of the witnesses that the salt water destroyed the fish and timber was based entirely on the assumption that the salt content was sufficient to bring about that result. That assumption was wholly without foundation in actual experience of the witnesses, or knowledge of the salt content of the water, and without the aid of visible effects peculiarly associated with salt water damage that would in some acceptable degree distinguish the asserted cause of destruction from any number of other possible causes.
>
> "The mere fact that water tasted salty will not support an inference of evidential verity that dead fish found in such water, and dead trees near by were destroyed as a result of the salt content of the water. Nor will the courts take judicial notice that such result will follow. Shell Petroleum Corp. v. Worley, 185 Okla. 265, 91 P. 2d 679, 680.
>
> "The evidence having so failed, the trial court should have sustained the separate motions of defendants for directed verdict. The pronouncement of this court in the case last cited fully governs our decision here. It was there held as follows: 'The court will not take judicial notice that water which merely tastes salty contains sufficient salt to kill or injure growing trees.'
>
> "Defendants showed by the testimony of ex-

pert witnesses that numerous scientific tests of the water and soil on plaintiff's land failed to indicate sufficient salt content therein to cause any part of the injuries complained of. That evidence was wholly uncontradicted. However, had defendants produced no such evidence, plaintiff's case would have failed for want of proof of causal connection."

That salt in sufficient quantities will kill any type of vegetation, and that it will kill animals is well known, but we find that this is not a matter of judicial knowledge or of common knowledge, and we submit that this case is a full and complete answer to the contention and argument of Appellees as to the inferences that can be drawn, as to the right of jurors to completely disregard undisputed, expert testimony, and as to the necessity of requiring expert testimony to establish the amount of fluoride necessary to damage trout or trout eggs.

In *Prest-O-Lite Co., Inc. v. Howery,* (Okla.) 37 P. 2d 303, a case where plaintiff sued for damages arising out of pollution of a stream, the verdict rendered in favor of the plaintiff was reversed on appeal. It was the plaintiff's contention that his livestock, chickens, ducks, brood sows and cows were damaged by reason of pollution of his stream with salt. The plaintiff's testimony, with reference to his chickens, follows closely the pattern of the testimony of the Meaders, and especially Phil Meader, who undertook to tell what caused the damage and how the fish were affected, and we quote from the opinion as follows:

" 'Q. Now, tell the jury how these chickens were effected? A. Well sir, they just—some of them just fall over dead, and some of them would droop around for a few days, and they would just get so they couldn't walk, they would just set down and they never could get up any more.

" 'Q. And they would die, how many a day? A. Well, I have seen as high as fifteen to twenty-five.

" 'Q. You would find them dead in the morning when you went out? A. Yes, sir.

" 'Q. You think you averaged some fifteen to twenty-five chickens that died every twenty-four hours, is that right? A. Yes, sir.'

"Plaintiff also testified that a brood sow and four shoats died and that two cows lost their calves and were further depreciated and damaged in value. He also testified that the fowls and stock had access to the water in the creek; that he did not attempt to prevent them from drinking creek water since at the time he did not know that there was anything wrong with the water. He further testified that he did not know why the fowls and stock died; that none of the chickens were examined to determine the cause of their death, but that he did call a veterinarian to see his cow when it was sick. The veterinarian testified that the cow was suffering from enteritis or inflammation of the bowls,

and he assumed that drinking this water from the creek was the cause of the trouble since he could find no other cause therefor. He did not make an analysis of the water, but placed his hand in the creek water and noticed that it caused a "puckery" feeling.

"In the light of these authorities the recovery by plaintiff herein cannot stand. While the proximate cause may be proved by circumstantial evidence, a recovery cannot be had by adding inference to inference or presumption to presumption, and the want of evidence cannot be thus supplied by deductions. If it had been proved that at the time the injuries were incurred there were poisonous or deleterious substances in the water, harmful to animal life, or if it had been proved that the animals and fowls died as a result of drinking the water, a different situation would prevail, but the failure to prove one of these circumstances is fatal to plaintiff's right of recovery."

It is undisputed that there is fluoride in all waters, that there is fluoride in the soil, and in vegetation, but for it to be damaging to animals it must reach a certain concentration. The burden was upon the plaintiffs in this case to prove that such a concentration was present. They not only did not prove it in the evidence introduced by them, but the experts for both Appellants and Appellees proved the contrary.

One sampling from flowing water taken in 1953

at an indeterminate time over a four-year period showing 4.7 ppm of fluoride cannot prove that the water retained that concentration for any length of time. The proof does, however, show that water samples in the same and subsequent years did not in any instance show a fluoride concentration damaging or injurious to trout or trout eggs. To contend otherwise is simply to ignore the evidence and to say that the scientific analysis shall be disregarded in all but one of some 96 samplings, and to reason erroneously that the one sample showing 4.7 ppm establishes a concentration of fluoride in the waters for a period of four years.

In addition, there is no proof whatever that there were any trout in the spring from which this isolated, unreliable analysis of 4.7 ppm shows up, but assuming there were trout in that particular spring were they adult trout, were they fingerling or what size trout were they? The record is silent on this score. Was this in a spring where the water flowed into the hatchery troughs? This certainly could not be, as the record shows without dispute that there was never a sampling of water in the hatchery troughs where the fluorine analyses exceeded 1 ppm. We submit guess, conjecture and surmise is not substantial proof.

In *Christensen v. Northern States Power Co. of Wisconsin,* (Minn.) 25 N.W. 2d 659, plaintiffs had leased a lake for the purpose of raising minnows and fish for sale. The defendants had erected a tower

in the lake to carry their power lines. The lines carried 66,000 volts of electricity and because of an ice condition the defendants attempted to blast the ice in order to protect their tower, the result being that the tower fell into the lake and current shorted into the water for a period of some 4 seconds. A great many of the fish died shortly thereafter. From a judgment for the plaintiffs on appeal the Supreme Court reversed the same, saying:

> "The real question presented for decision is whether or not there is sufficient evidence that either the electric current or the dynamite killed the fish * * *
>
> "What effect electricity would have is a matter which this Court cannot take judicial notice, for the simple reason it is not a matter of common knowledge * * *
>
> "For the same reason they cannot take judicial notice of the effect of electricity upon the water, we cannot do so with reference to the blasts of dynamite.
>
> "The contention that all the minnows and fish, or even a sufficient part of them in a lake of this size were killed by these blasts would likewise be merely speculative and conjectural."

If the Court cannot take judicial notice that 66,000 volts of electricity will damage fish life in water, when the courts uniformly recognized the deadly effect of electricity in water, how can it be argued

that the court or jury in the instant case could take such notice, absent any proof, of the amount of fluoride concentration, which must exist in water, to kill trout daily by the tons for over a period of some four years, or to affect the eggs of trout.

As was said in the case of *Whitney v. Olson*, (Okla.) 218 P. 2d 899, the number of causes that could have been responsible for an injury claimed by the plaintiffs in that case was limited only by the extent of the imagination.

The statement of counsel for plaintiffs (R. 123) and the testimony of Witness Nelson (R. 348-373) clearly set forth the great variety of causes to which the loss of plaintiffs' trout and the failure of the eggs to hatch could be attributed. This principle is also supported by *Hepner v. Quapaw Gas Co.*, (Okla.) 217 P. 438.

In *Teeter v. Municipal City of LaPorte*, (Ind.) 139 N.E. 2d 158, the Supreme Court stated that it judicially knew that the fluoridation of public water supply is a reasonable exercise of the police powers, but the Court pointed out that it was not in a position to hold conclusively as a matter of law as to the effect of fluorine.

The question of the effect of fluoride on the cellular system of any animal is based upon scientific fact, and the Court will not take judicial notice of scientific matters of uncertainty or matters which are in dispute. The Court will not take judicial notice of

powder magazines, or inflammable liquids, 20 *Am. Jur.* 111, Sec. 97; 133 Sec. 130.

> "Courts cannot take judicial notice of what percentage of mineral can be extracted from a particular class of ore, which is a matter of proof in each particular case where material." *Dixon v. Southern Pac. Co.*, 172 P. 368

> "It is not a known law of nature of which the court may take judicial notice that metals such as iron and steel possess properties which perceptibly attract lightning and enhance the danger from lightning within the sphere of their influence." *Wiggins v. Industrial Accident Board*, 170 P. 9

There are two cases in the Circuit Court of Appeals, Ninth Circuit, involving damage by fluoride. *Arvidson v. Reynolds Metal Company*, 125 F. Supp. 481, affirmed in 236 F. 2d 224, and *Reynolds v. Yturbide*, 258 F. 2d 321. The *Arvidson* case is for nuisance and the *Yturbide* case is based upon negligence. There is one fluoride case in the Tenth Circuit, *Erekson v. U. S. Steel*, 260 F. 2d 423, a Utah case tried upon exactly the same theory and under similar pleadings as the case at bar.

The *Arvidson* case involved damage to cattle and the *Erekson* case damage to cattle, sheep and plant life. The *Yturbide* case was one for personal injury. All of these cases are important both on the question of whether expert testimony is necessary in proving

damage to animal life by fluorides, the amount of proof necessary, and what amounts to causal connection.

In the *Arvidson* case the Trial Court had the following to say:

> "When all these matters are considered, it can be seen that any specific finding of fluorine content in forage on the particular property of any plaintiff must be very largely if not wholly a matter of speculation and conjecture. * * *
>
> "Plaintiffs have not sustained the burden of producing a preponderance of credible evidence to establish (a) fluorine content in the forage on their lands in amounts above non-toxic limits; (b) substantial fluorine content in forage attributable to effluents from defendant's plants; or (c) that plaintiff's lands or cattle sustained fluorine damage in particulars with reasonable or any certainty. * * * "

The Ninth Circuit by affirming the lower court approved the foregoing statement of the trial judge as to the elements necessary to establish liability on a defendant in a nuisance case.

The *Yturbide* case is important since all of the opinions disclose the necessity of establishing claimed damage from fluoride through expert testimony. There was a substantial dispute among the experts, and the Court found the expert testimony of the plaintiffs reasonable and that it substantiated the claim of damage.

There can be no contention that without an examination of the individuals by the medical experts and without their direct testimony that the plaintiffs had fluorosis the plaintiffs otherwise could have recovered. The fact standing alone that Reynolds Metal Company was negligent in the *Yturbide* case in allowing excessive amounts of fluoride to be emitted did not prove the plaintiffs' case. Additionally, expert testimony was required to relate the emissions of fluorides to the damage suffered by the plaintiffs.

In the *Ereskson* case we find the following statement by the Tenth Circuit:

> "From the scientific proof, the referee found, and the appellee concedes, that during the years complained of, potentially harmful quantities of fluorine gases did emanate from the appellee's Genēva Plant; that it did fall upon the appellants' lands and vegetation in varying quantities; and that such vegetation was consumed by the appellants' livestock. And, the appellees further concedes its legal liability for any substantial harm caused thereby. And see Reynolds Metal Co. v. Yturbide, 9 Cir., 258 F. 2d 321; E. Rauh & Sons Fertilizer Co. v. Shreffler, 6 Cir., 139 F. 2d 38; Anderson v. American Smelting & Refining Co., D.C., 265 Fed. 928.
>
> "Based upon controlled experiments and other scientific analysis, the referee established a 'tolerance level' below which the ingestion of fluorine by livestock was found to be harmless

and above which there was a possibility, and then a probability of harm. * * * From evidence of scientific forage sampling and atmospheric tests, the referee suggested, and the trial court found, that in a number of areas involved, fluorine in forage reached the border-line level of harmful concentration. And it was therefore necessary to consider the available data relating to specific levels of exposure in connection with the claims of each claimant."

Now, in the instant case, even if it could be assumed that the Court could hold, or the jury could say, potentially harmful quantities of fluoride particulates did emanate from Appellants' plants in an amount to be harmful to livestock, that by reason of the location of Appellees' property that such quantities did fall on the vegetation on the Meader lands which could be damaging to livestock, that certainly is absolutely as far as the Court or the jury could go. Under the evidence there is no proof that these particulates in any way affected the fluoride content of the Meader water, that they in any way were ingested by fish at the Hatchery, that fish consumed such fluoride or that the fluoride content of the water previous or subsequent to the erection and operation of the plants and their operation, was changed in any manner.

B. NEITHER THE COURT NOR JURY CAN IGNORE OR DISBELIEVE THE POSITIVE, UNCONTRADICTED TESTIMONY OF WITNESSES NOT IMPEACHED NOR DISCREDITED, AND A

FACT CANNOT BE ESTABLISHED AS SUCH THROUGH CIRCUMSTANTIAL EVIDENCE WHEN THE SAME IS INCONSISTENT WITH DIRECT, UNCONTRADICTED, RELIABLE, UNIMPEACHED TESTIMONY THAT SUCH FACT DOES NOT EXIST.

It is firmly established by the decisions of the Supreme Court of the State of Idaho, as well as many other jurisdictions, that where the testimony of competent witnesses is uncontradicted it cannot be disregarded by courts and juries.

Also, where expert testimony is necessary and required to prove a fact such testimony cannot be ignored.

The case of *Esso Standard Oil Co. v. Stewart*, (Va.) 59 S.E. 2d 67, 18 A.L.R. 2d 1319, is directly in point. A verdict for the plaintiff was reversed on appeal. Involved was an action for damages by reason of smoke from an oil furnace upon which the defendant's employee had worked. There is a thorough discussion in the annotation at 18 A.L.R. 2d 1319. The principle laid down is firmly established in the law.

It certainly is not without significance that the *Esso* case and the annotation, supra, are cited, approved, and adopted as the law of the State of Idaho. In *Splinter v. City of Nampa*, 256 P. 2d 215, the Court disposes of the plaintiff's position in the instant case, and especially the proposition of law now referred when it said:

"Therefore, the positive testimony of the man who delivered the gas is not inconsistent with any of the circumstances established by other evidence, and not being improbable or otherwise discredited, it is entitled to credit. Sullivan v. Northern Pac. Co., 109 Mont. 93, 94 P. 2d 651; Esso Standard Oil Co. v. Stewart, 190 Va. 949, 59 SE 2d 67, 18 ALR 2d 1319; Pierstorff v. Gray's Auto Shop, 58 Ida. 438, 74 P. 2d 171; First Trust & Savings Bank v. Randall, 59 Ida. 705, 89 P. 2d 741; In re: Odberg's Estate, 67 Ida. 447, 182 P. 2d 945."

The Idaho cases of *Beaver v. Morrison-Knudson Co.*, 55 Idaho 275, 41 P. 2d 605; *Suren v. Sunshine Mining Co.*, 58 Idaho 101, 70 P. 2d 399; *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 231 P. 418 and the many other cases referred to therein support the principle of the weight accorded positive, uncontradicted testimony and unless Appellees are able to show that the rule is otherwise the judgment cannot stand.

In *Engelking v. Carlson*, (Cal.) 88 P. 2d 695, the court held that the determination whether or not a physician possessed the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality could only be determined by experts, stating:

"When the matter in issue is one within the knowledge of experts only and is not within the

common knowledge of laymen, the expert evidence is conclusive."

Likewise, in *William Simpson Const. Co., et al v. Industrial Accident Commission*, (Cal.) 240 P. 58 we find:

> "Whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases neither the court nor the jury can disregard such evidence of experts, but, on the other hand, they are bound by such evidence, even if it is contradicted by non-expert witnesses."

See also: *American National Insurance Co. v. Smith*, (Tenn.) 74 S.W. 2d 1078; *Scott v. Liberty Mutual Insurance Co.*, (Tex.) 204 S.W. 2d 16; *Harris v. Nashville C. and St. L Ry.*, (Ala.) 44 S. 962; *Kramer Service v. Wilkins*, (Mo.) 186 S. 625; *Hinnenkamp v. Metropolitan Life Ins. Co.*, (Neb.) 279 N.W. 784; *Johnson v. Agerbeck*, (Minn.) 77 N.W. 2d 539; *Kundiger v. Prudential Life Ins. Co.*, (Minn.) 17 N. W. 2d 49; *Ayers v. Parry*, 192 F. 2d 181.

Another case clearly illustrating this principle is that of *Ewing v. Goode*, 78 F. 442 (CCA 7), where we find this statement:

> "In many cases, expert evidence, though all tending one way, is not conclusive upon the court and jury, but the latter, as men of affairs,

may draw their own inferences from the facts, and accept or reject the statements of the experts; but such cases are where the subject of discussion is on the borderline between the domain of general and expert knowledge, as, for instance, where the value of land is involved, or where the value of professional services is in dispute. There the mode of reaching conclusions from the facts when stated is not so different from the inferences of common knowledge that expert testimony can be anything more than a mere guide. But when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependent upon expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury."

See also: *Commonwealth Life Insurance Co. v. Harmon,* (Ala.) 153 S. 755; *Life and Casualty Co. v. Burke,* (Ala.) 88 S. 2d 338.

In *Kellar v. Sproat, et al,* 35 Idaho 273, 205 P. 894, the Court said, "Testimony as to value is generally to be given by experts."

If the value of land is not within the common knowledge of jurors in the State of Idaho, how can it be claimed that the question of damage to trout or

trout eggs by fluoride is a matter of common knowledge and that it is not subject to proof by expert testimony.

Assuming for the purpose of argument that jurors may disbelieve experts or any witness in their entirety and are not bound to accept positive testimony, then plaintiffs are bound by the reasoning in *William Simpson Const. Co., et al v. Industrial Accident Commission*, (Cal.) 240 P. 58, and *In re Sanderson's Case*, 224 (Mass.) 558 113 N.E. 355.

It is elemental that the refusal to believe the testimony of a witness or to disregard the statement of a witness does not establish proof contrary to such statement. Failure to believe a statement of facts does not establish anything to the contrary.

Appellants realize that Appellees could prove their case by the introduction of both expert and lay testimony, but there must be some point at which the expert and lay witnesses coincide.

It is recognized that those with long, practical experience are quite often allowed to testify with reference to disease of animals or the affect upon animals of certain poisons or to the disease of the same, but here we have the Appellees offering the testimony of numerous fish hatchery men experienced in the handling of trout and trout eggs, without first making any attempt whatever to qualify such persons as experts.

It is necessary to study the testimony of Appellees' expert witness, Gale, to determine what he really

gave as an opinion, and the effect of his testimony. His testimony was to the effect that cells of animals, coming in contact with 3 ppm fluorine would suffer some damage but that they would recover and that a trout would do well in water of 3 ppm fluorine, or in waters of a level less than 4.5 ppm fluorine.

The testimony of Dr. Gale did not in any way conflict with the testimony of Appellants' experts insofar as the Meader trout or eggs were concerned. He did not testify that any damage thereto resulted from Appellants' emissions of fluorine.

Appellees' case rests entirely on conjecture. Without proof of damage from Appellants' manufacturing processes, merely because of the proximity of the plants, and the loss of fish and fish eggs being above normal losses, Appellees contend the proximate cause of their damage was fluorosis resulting from Appellants' fluoride emissions.

C. AT THE TIME OF TRIAL APPELLEES HAD IN THEIR POSSESSION REPORTS AND WATER ANALYSES OF VARIOUS SCIENTISTS EMPLOYED BY THEM TO MAKE SUCH REPORTS AND ANALYSES, AND APPELLEES' FAILURE TO MAKE SUCH EVIDENCE AVAILABLE OR TO PRODUCE THE SAME AT THE TIME OF TRIAL RAISES THE PRESUMPTION THAT THE TESTIMONY OF SUCH EXPERTS AND SUCH REPORTS AND ANALYSES WAS UNFAVORABLE TO THEIR CASE. THE FAILURE OF APPELLEES TO ELICIT FROM SAID

EXPERTS OR FROM THEIR WITNESSES WEISE AND GALE THE CAUSE OF THE CONDITION IN THEIR TROUT AND TROUT EGGS WITH RESPECT TO DAMAGE BY FLUORINE RAISES THE PRESUMPTION THAT THE ANSWERS THERETO WOULD HAVE BEEN UNFAVORABLE TO THEIR CASE.

It was disclosed at a meeting of all counsel with the Court at a pre-trial hearing (R. 112-129) that the Appellees had had work done by experts with the Utah State College and that their counsel expected to have one or two experts testify to the effect of fluorine in general in the area. (R. 116) Appellees' counsel was asked specifically by the Court about bringing in the expert witnesses from Utah who had conducted such experiments. (R. 123) It was further stated (R. 125-126) that scientific evidence would be produced by Appellees to prove their case.

Appellees had in their possession reports and analyses by Dr. Greenwood and Dr. Ziegler of the Utah State University, and they had in their possession water analyses made by Dr. Leonard, but they failed and refused to use or introduce this testimony, the presumption being that the testimony was unfavorable to them.

> "The broad rule prevails that the omission by a party to produce important testimony relating to a fact of which he has knowledge, and which is peculiarly within his control, raises the

presumption that the testimony, if produced, would be unfavorable to his cause." 20 *Am. Jur.* 145, Sec. 140.

"It is a well-established rule that where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the jury may draw an inference that such evidence would be unfavorable to him. This rule is uniformly applied by the courts and is an integral part of our jurisprudence. If weaker and less satisfactory evidence is given and relied on in support of a fact when it is apparent to the court and jury that proof of a more direct and explicit character is within the power of the party, it may be presumed that the better evidence, if given, will be unfavorable to him." 20 *Am. Jur.* 188, Sec. 183

"It is well settled that if a party fails to produce the testimony of an available witness on a material issue in the cause, it may be inferred that his testimony, if presented, would be adverse to the party who fails to call the witness." 20 *Am. Jur.* 192, Sec. 187

The above rules are applicable in the instant case, and we seriously urge this point. Dr. Gale is a resident of Pocatello, he knows the location of the defendant plant, he is the head of the Pharmacy School at Idaho State College where an analysis could readi-

ly have been made of fish and fish eggs or of the water at the Meader Hatchery, but his testimony is to the effect that:

> "Q. In order to tell anything about a fish in the water at the Meader Hatchery you would have to make an analysis of the water and the fish and know the background wouldn't you?
>
> "A. Yes, sir." (R. 289)

It was disclosed that this witness had never been asked to analyze any of the water at the hatchery, (R. 284-286, 288) that he had never made any examination whatever of the water at the Hatchery or the fish, and that his testimony is limited to cell life as a general proposition. He stated as follows:

> "A. One of us is mixed up. I was asked to testify to the toxicity of fluoride. I do not mean to be rude, but I am not an expert on fish." (R. 289)

Another of Appellees' witnesses, Dr. Weise of the University of Idaho, who testified by desposition, certainly knew from his water survey of the area the fluoride content, if any, in the Meader waters that was of such toxicity as to be damaging to cell life, but he was not asked for an opinion.

Appellants' Exhibit 17 was a complete fluorine analysis of fish, large and small, from the Meader Hatchery made by Dr. Greenwood for Appellees and a complete fluorine analysis of the runoff water from the soil into hatchery waters.

What was his opinion as to whether the fluoride content was dangerous or damaging to trout? If that opinion had been favorable to Appellees he would have been called.

Appellees had available their own surveys and reports, and fluorine analyses of water and fish. Even-handed justice required that they use their experts if the testimony was favorable. Of course, it is obvious they could not.

D. THE JURY SHOULD HAVE BEEN INSTRUCTED THAT IF ANY DAMAGES WERE ALLOWED APPELLEES FOR A LOSS OF PROFIT FROM THEIR HATCHERY AND TROUT EGG BUSINESS, A REASONABLE REDUCTION BY WAY OF SALARY FOR SAID PERSONS SHOULD HAVE BEEN MADE IN ARRIVING AT THE AMOUNT OF SUCH DAMAGES.

Appellants asked for and were denied an instruction that if the jury considered the net profits from the hatchery business to the Appellees on a yearly basis in determining rental value of the premises that a reasonable amount for the salaries of Appellees for their services rendered should be deducted from such net profits.

The record discloses Appellees' son, after 1950 and into 1954, was employed to run the hatchery business at one-third of the net profits received from the business. (Appellees' Exhibit 14; R. 449-453, 544) May Meader, one of the Appellees, testified in the affirma-

tive when asked on cross-examination whether or not a third of the profits was a reasonable wage or salary for operating the business. (R. 776) The Appellees' tax returns, in evidence, do not disclose any salary for Appellees as a deductible expense. (R. 796)

In support of this proposition we refer to the following statement from the text:

> "In commerce profits mean the advance in the price of goods sold beyond the cost of purchase. In distinction from the wages of labor, they are understood to imply the net return to capital or stock employed, after deducting all expenses, including not only the wages of those employed by the capitalist, but also the wages of the capitalist himself for superintending the employment of his capital stock." 15 *Am. Jur., Damages* Sec. 158

> "Value of the plaintiff's services in the performance of the contract is an item to be considered in the cost of performance." 25 C.J.S. *Damages* Sec. 90, Page 633, Footnote 99

Likewise, supporting this contention is *Maddox v. International Paper Co.*, (La.) 47 F. Supp. 829. This case involved a suit by the owner of a commercial fishing camp against the defendant company for the destruction of his fishing business as a result of the discharge of waste products from the paper mill of the defendant. The proof clearly established plaintiff's business was destroyed and that prior to its destruction plaintiff enjoyed a net profit of $3,000.00

per year. In the face of this proof the Court, however, awarded only the sum of $2,000.00 per year for the period covered. The reduction of $1,000.00 being made upon the following basis:

> "It may be stated that as a general rule in tort actions a recovery may be had for loss of profits, provided their loss is the proximate result of defendant's wrong and they can be shown with reasonable certainty. In commerce profits means the advance in the price of goods sold beyond the cost of purchase. In distinction from the wages of labor they are understood to imply the net return to capital or stock employed after deducting all the expenses, including not only the wages of those employed by the capitalist but also of the capitalist himself for superintending the employment of his capital stock."

See also *Molyneux v. Twin Falls Canal Co.*, 54 Idaho 619, 35 P. 2d 651; *Columbus Mining Co., v. Ross*, (Ky.) 290 S.W. 1052; *People v. San Francisco Savings Union*, (Cal.) 13 P. 498. We refer also to the case of *Buck v. Mueller*, (Ore.) 351 P. 2d 61, which was an action by a tenant to recover damages for alleged breach of a covenant to renew a lease. In determining what the damages were the Court stated:

> "In computing the cost of operating the business, plaintiff must include the value of his own services and those of his wife. * * * The Court found that the reasonable value of the services of plaintiff and his wife and the reasonable value

of meals withdrawn by them was $1,362.20. The Court deducted this amount from the sum of $1,775.14 in computing the loss of profits."

We submit, therefore, that under the foregoing citations the trial court erred in not so instructing the jury that from the profits accruing to Appellees from their hatchery business there should be deducted a reasonable amount for their services rendered before they could consider such profit in connection with the reasonable rental value of the premises, which was the applicable measure of damages.

E. THE MERE FACT THAT A DEFENDANT IS GUILTY OF SOME WRONGFUL ACT OR OF COMMITTING A NUISANCE, IF SUCH FACT IS FOUND, DOES NOT ESTABLISH LIABILITY ON SAID DEFENDANT.

It seems to be Appellees' contention that because Appellants permitted the emission of fluorides, knowing it was toxic, this alone established a case for the jury, and that if the loss to the Appellees is not otherwise accounted for by Appellants Appellees are entitled to a verdict.

Such is not the law, even though there is a violation of an ordinance or statute which is negligence per se, the violation is not actionable unless proximate cause is shown, and plaintiffs must show a causal connection. See *Cook v. Seidenverg*, (Wash.) 217 P. 2d 799:

"In Eckerson v. Ford's Prairie School Dist. No. 11 of Lewis County, 3 Wash. 2d 475, 101 P.

2d 345, 349, we defined the term 'proximate or legal cause' as follows: 'An actual cause, or cause in fact, exists when the act of the defendant is a necessary antecedent of the consequences for which recovery is sought, that is, when the injury would not have resulted but for the act in question. But a cause in fact, although it is a sine qua non of legal liability, does not of itself support an action for negligence. Considerations of justice and public policy require that a certain degree of proximity exist between the act done or omitted and the harm sustained, before legal liability may be predicated upon the 'cause' in question. It is only when this necessary degree of proximity is present that the cause in fact becomes a legal, or proximate cause.' "

See also *Sheridan v. Deep Rock Oil Co.*, (Okla.) 205 P. 2d 276:

"The essential elements of 'actionable negligence' where the wrong is not wilful or intentional, are the existence of a duty of defendant to protect plaintiff from injury, failure of defendant to perform that duty and injury to plaintiff proximately resulting from such failure.

"Regardless of the extent to which defendant may be guilty of negligence, no recovery may be had unless plaintiff's injury was proximately and directly caused by such negligence.

"In a negligence case, where all of the evi-

dence favorable to plaintiff, together with all inferences and conclusions to be reasonably drawn therefrom is insufficient to point out clearly a causal connection between the alleged negligence and the injury, and no element of wilful or intentional wrong is present, the question of proximate cause is one of law."

F. APPELLANTS HAVING FULLY MET AND REBUTTED ANY AND ALL LEGAL PRESUMPTIONS THAT EXISTED IN FAVOR OF APPELLEES, THE BURDEN OF PROOF SHIFTED BACK TO APPELLEES AND THE SAME WAS NOT SUSTAINED.

Even under Appellees' contention that a presumption existed in their favor and Appellants were required to meet the burden, Appellants having done so and produced positive and undisputed testimony which neither the Court nor the jury could legally disregard, the burden again shifted to Appellees who made no attempt to meet the same.

> "Presumptions are intended to supply the place of facts; they may never be used to deny the existence of, or contradict plain and established facts." 20 *Am. Jur.* 169, Sec. 164
>
> "Ordinarily the effect of scientific principles and natural laws in reference to evidence is considered in determining the weight and sufficiency of the evidence in a particular case to support a verdict." 20 *Am. Jur.* 248, Sec. 256.1
>
> "The burden of going forward with the evi-

> dence, which is imposed upon a party when his adversary, who has the burden of proof upon the whole case, makes out a prima facie case or establishes facts which give use to a presumption in his favor, is met by evidence which balances that introduced by the latter, and the burden then shifts back." 20 *Am. Jur.* 137, Sec. 134

After Wohlers and Wood disproved Appellees' claim of fluoride damage, and after the fluorine analysis of the fish and of the leaves the day of the loss in September 1954, the burden was on the plaintiffs to at least contradict such proof if they claimed it of no probative validity.

Appellees' experts were available to disprove Kass's testimony that there was no change in the particulate matter in the shale as mined, and after processing. If Appellees disputed the fact, they had ample opportunity to show that the analysis of a sample from still water in a spring where the shale was mined was not valid. Of course, they could not meet the burden, "the ice was too thin."

G. IT IS APPARENT THAT THE FLUORIDE EMISSIONS PER DAY FROM APPELLANTS' PLANTS BORE NO RELATION TO THE FLUORIDE LEVEL IN THE MEADER WATERS, NOR TO THE DAMAGE TO TROUT OR TO TROUT EGGS, THE 1955-1956 LOSSES BEING IDENTICAL TO THOSE IN 1953 AND 1954.

FURTHER, THE SURVEYS OF THE UNIVERSITY OF IDAHO INTRODUCED IN EVI-

DENCE ESTABLISH CONCLUSIVELY THE UTTER LACK OF CONTAMINATION OF THE MEADER WATERS BY FLUORINE.

IT IS FURTHER APPARENT THAT SINCE FROM THE RECORD THE APPELLEES SUSTAINED NO LOSS OF PROFITS IN THE YEAR 1953, IT BEING SHOWN THAT THE NET PROFIT TO THE HATCHERY IN THAT YEAR WAS THREE TIMES THE AMOUNT OF PROFIT IN ANY PRIOR YEAR, THE VERDICT OF THE JURY MUST HAVE BEEN BASED ON LOSS OF PROFITS FOR THE YEARS 1954, 1955 AND 1956. THE EVIDENCE AFFIRMATIVELY DISCLOSES DURING THE LATTER THREE YEARS NOT ONE WATER SAMPLE OR OTHER EVIDENCE THAT SAID WATERS AT THE HATCHERY CONTAINED FLUORIDE IN ANY AMOUNTS DAMAGING TO TROUT OR TROUT EGGS.

Appellees tried their case upon the theory of contamination of vegetation, and showed the results of vegetation sampling for fluorine in the Pocatello area. But, there was a complete lack of testimony to show any connection or tie between the fluorine content of vegetation samples and that of the water samples.

While the analysis of vegetation in the area showed an elevation of fluoride content in relation to the Appellants' plants, however it is elemental this was because the stationary vegetation would collect and

breathe dust and effluents including fluoride. But this is definitely not true of constantly flowing water. There is no evidence in the record recognizing any problem of the contamination of flowing water by fluoride from the atmosphere, and in fact the record shows such possible contamination does not exist.

Pollution of water is not caused by airborne effluents, but by the direct flow of waste material into the water. No cases exist where flowing water is affected by airborne fluoride, but there are cases where fluoride is directly deposited in water.

The testimony of Dr. Gale was not based in any respect upon the conditions at the Meader Hatchery where there is a constant flow of water, and he made this very clear:

Dr. Gale:

> "A. Well, 4.5 parts per million would not accommodate a trout in its natural state.
>
> "Q. In a stream?
>
> "A. You cannot do it on a stream. There are too many problems of the stream, and the volume of flow." (R. 286)
>
> "Q. Now, in our illustration that we have been using yesterday and today, of fish in water of 4.5 parts per million, do you assume it to be soft water or hard water in connection with your answers?"

Dr. Gale:

> "A. I was not assuming it to be water in the first place in my answer in the sense that you are now using it—not as river water or spring water, but as the total ingestion of parts per million of fluoride at 4.4." (R. 310)

Dr. Gale also made it clear that he was not assuming the fish got 4.5 ppm from the water but that the cellular system was exposed to such a concentration.

> "Q. When you say that fluorine affects fish, you are talking about the fluorine in the cells; is that correct?

Dr. Gale:

> "A. The fluorine made available to the cells, that is right, because the cell would not want to store fluorine, fluorine is a toxic substance, and is not there for a purpose in the fish, or in any organism." (R. 308)

The flow of the Meader water is 12,000 gallons per minute; (Exhibit 32) there was a good flow.

> "A. Oh, yes, there was plenty. My ponds have lots of fall from one to the other." (R. 536)

Witnesses testified as to great losses of fish in the raceways, where there is "lots of fall". The Appellees' theory is and, of course, had to be that fluoride from the air caused the damage, by falling directly into the water from the air and being washed into the water from the soil and vegetation near the

water. Certainly fluoride from Appellants' plants could not fall into the water unless borne over the water by air currents. The proof shows the wind blew in the direction of the Meader Hatchery from Appellants' plants not over a combined total for both operations of 17% of the time. The only other occasion that the smoke would hang over the water was during periods of "inversion". Mr. Overas, (R. 1107) says there is no record of this at all as to time.

The only other claimed source of fluoride contamination was from the washing of leaves or vegetation during rains.

We first discuss the expert testimony recognized by all parties as a necessity to lay the foundation for the proposition that fluoride in certain amounts was or is damaging to trout life.

At this point we assert there is no dispute among the experts on the proposition that fluoride did not, in fact, cause the damage or the loss claimed by the Appellees.

Giving to Dr. Gale all inferences to which his testimony is entitled, the fact remains that he stated positively he did not know whether the fish suffered by reason of their contact with fluoride; that he did not know what caused the loss and that he could not have ascertained that without an analysis or examination of the trout or trout eggs. Further, he was not asked for any opinion based upon the testimony of the Appellants' witnesses.

In addition, in evidence is Appellants' Exhibit 37, which had been and was in the possession of the Appellees and which was secured by them through their counsel from the Utah State Agricultural College, which exhibit definitely established the loss or damage was not, and could not have been, caused by fluoride.

The uncontradicted testimony of Dr. Wohlers and Dr. Wood also established fluoride was not the cause.

> "Q. In your investigation, Dr. Wohlers, did you ever or were you ever able to establish that fluoride was the reason for the trouble at the Meader Fish Hatchery?
>
> "A. I was not.
>
> "Q. What do you have to say as to that now, as to what you knew about it?
>
> "A. Well, as far as I know now, I am positive that fluorides have nothing to do whatever with the Meader problem." (R. 1009)
>
> "Q. In other words, what comes out of the plants, whether it be fluorides that are emitted and where they are emitted, the amount per 24-hour day, you don't feel would have much to do with the problem as to whether the Meader fish were being damaged by the fluorides?
>
> "A. That is correct, as long as they had the fluoride content of the water, which I did give them.

"Q. Your feeling is that the various samples which you took, which you said in all were how many?

"A. Thirty six.

"Q. Thirty six. You believe that these samples would give you a complete story of all of the data, day-after-day that the smoke and gas may or may not have been in and around the Meader property?

"A. That is correct.

"Q. That would be true without considering the phenomena of inversion where the air holds low to the ground, that would have no importance at all?

"A. It would have absolutely no importance, Mr. Racine." (R. 1044-1045)

Dr. Wohlers further testified that the particulate material from the Westvaco plant was insoluble, and showed conclusively, and without contradiction, that it could not affect the fluoride level of the water to raise it to a level that would be damaging to fish. Such emission from the plant as shown by the record, with relation to the possibility of contamination of the water, was absolutely insignificant. (R. 1013-1014) And the testimony of Dr. Wood:

"A. Yes, I have an opinion.

"Q. What is that opinion?

"A. I don't think that, under the conditions

described here, and as I was about to say, I heard the mortality described by Mr. Warren Meader before I left last week, I don't think under any conceivable stretch of the imagination could you have reached sufficient fluorine levels to produce the type of kill that was produced and described in this particular pond under these circumstances.

"Q. Why do you say that?

"A. In order to get a kill of this type, which would fit the circumstances described, it would require a fluorine level in the water of an absolute minimum of 500 parts per million with the range to 2,500 parts per million with the upper limits much more likely the condition necessary to cause a mortality over this short period of time by fluorine.

"Q. Now, let's assume that fluorine limits could be obtained out there, although the proof does not show it, and let's assume all of the other elements in the last question. I hope that I don't have to repeat all of those elements. Do you have an opinion as to whether or not fluorine toxicity could or could not be ruled out in that connection as accounting for a large mortality, or kill, as you have termed it?

"A. Yes.

"Q. What is that opinion?

"A. Even though the fluoride levels were

reached of say 2,500 parts per million and that these were responsible for the kill it could be ruled out as a factor in this mortality by analysis of the fish following the mortality. It has been shown that at levels of this extreme nature which are required for a sharp mortality of this type, that the fish absorb fluorides very rapidly and consequently the fluorine analysis following again a very acute mortality of this sort, would be very high, in the general range or maximum of 10 thousand parts per million, and no fluoride analysis has shown levels of this type here.

"Q. 10 thousand parts per million where?

"A. Of bone." (R. 1067-1068)

A number of fluorine analyses of fish and fish bone are in evidence, the samples having been taken by Dr. Greenwood, a recognized authority on the question of fluorides showing fluorine content far below any level resulting in damage to fish. (Exhibit 17)

Further, Dr. Wood heard the testimony of Warren Meader with reference to the mortality of the trout, (R. 1055, 1067) and at this point we think it it is very significant to call attention to a question asked Dr. Wood, and the objection of Appellees' counsel thereto:

"Q. The evidence has shown in this case that on occasion when certain ponds were raised or lowered that substantial mortality occurred and large kills occurred in the fish. Could you associate this with fluorine toxicity?

"Mr. Racine: If the Court please, we object to that question on the grounds that it is incompetent, and there are no facts upon which this witness could base any opinion because no information is given as to the vegetation analyses or the weed analyses surrounding these ponds where the water was raised and lowered.

"The Court: The objection will be sustained." (R. 1068-1069)

Now, Appellees, through Mr. Warren Meader, claimed as a significant point of proof that when he raised the level of water the fish swam into the weeds or vegetation on the sides of the banks of the ponds or runways, and that this had an amazing effect upon the fish. This evidence was given for the purpose of, and it was argued that such was the inference, that something from the plants or vegetation and weeds caused the damage to the fish. Yet note the objection, which was sustained, that those facts were not sufficient upon which an expert witness could base any opinion because there was no foundation given as to vegetation or weed analyses where the water was raised and lowered.

The Court, however, allowed the jury to speculate on this proposition. If an expert witness could not express an opinion as to the matter what was the observation or opinion of Mr. Meader worth?

The foregoing is typical of the position of Appellees who used only lay witnesses without expert

knowledge, unqualified to testify on causal connection.

The record is undisputed that Warren Meader called Dr. Wohlers to his hatchery in 1954 after a heavy loss of fish had occurred, and an analysis for fluorine was made of the leaves and of the fish and the information given to Meader. (R. 1010-1011) Thereafter, Appellees made no attempt whatever to establish by experts or laymen that the amount of fluoride shown by the analyses of the leaves or the fish was in any way damaging to fish or that it was even a possible cause of the loss claimed in that particular year.

The report by Dr. Ziegler directed to Appellees' counsel, (Exhibit 37) is conclusive proof by an expert of the plaintiffs' choosing that the fluoride content of the whole fish and the bone did not show the condition of fluorosis.

A painstaking and careful search of every available source known to Appellants has failed to produce any scientific data or authority, and none is in the record, supporting that flowing water can be contaminated by airborne effluents under conditions, even remotely, similar to the facts in the Meader case.

We have already shown that the Appellees' expert was not considering the effect of running water when he was testifying about the tolerable level of any and all cell life to fluoride. The report of Dr. Ziegler, Exhibit 37, had to do with experiments using aerated water in a tank, the water having been softened and containing soluble fluoride. The tests, and the amount

of soluble fluoride in still, soft water that would cause damage to trout is so far in excess of any water sampling in existence in the instant case that it seems simply incredible that inferences of lay witnesses can be permitted to achieve the result here obtained.

Any common sense appraisal or mathematic calculation not only disproves Appellees' attempt at a prima facie case but conclusively establishes that the damage suffered by the plaintiffs was not, and could not have been, the result of any fluoride contamination.

Exhibit 16 is a photograph of the Meader property. Only 1/16 of the area is covered by water. We submit the following example, predicted on the evidence in the record: If every pound of fluoride emitted from the plants in 1953, the year with the highest emission, could somehow be continuously funneled onto the portion of the Meader property shown in Exhibit 16, and if every pound of the fluoride was soluble and was retained on the property, it would raise the fluoride content of the Meader waters only 2.8 ppm. This is based on Exhibit 16, showing 1/16 of the Meader property area covered by water and is based on Exhibit 32 showing the Meader water flow rate to be 12,000 gallons per minute. The calculation is as follows:

6500 lbs F/day=4.5 lbs F/minute

12,000 gal/minute=100,000 lbs water/minute

$$\text{ppm F}=\frac{4.5 \times 1{,}000{,}000}{100{,}000} \times 1/16=2.8 \text{ ppm F}$$

As heretofore pointed out there is absolutely no way of determining the amount of time that smoke hung over the ponds by reason of inversion, and fluoride could only have gotten into the water directly from air currents including inversion. The wind could not have blown over the Meader property from both plants more than 17% of the time. Inversion occurs in the winter months, and if we allow six months of the year in which it could occur, it certainly would not occur all of the time, and would not occur when there was a wind, and it is inconceivable and impossible to apply to the above example the actual condition where the property was subjected to air current more than one-third of the whole time, and what will the result show? It shows conclusively that fluoride was not the problem.

Another illustration, a correct mathematic example and conclusion, shows that if it is assumed that Appellants' plant emissions were distributed and held within a two-mile radius of the plants (Appellees' Exhibits 1 through 9 definitely show the fluorides to be distributed over a much greater area), the Meader waters could have the fluoride content raised only 0.045 ppm. The proof of this is as follows:

$$\text{Area in 2 mile radius} = 8000 \text{ acres}$$

$$\text{Area of Meader water} = \frac{120}{16} = 8 \text{ acres}$$

$$\text{Ppm F in water} = \frac{8}{8000} \times \frac{4.5 \times 1{,}000{,}000}{100{,}000} = 0.045 \text{ ppm}$$

The only other source of contamination to the waters at the Meader Hatchery is claimed to be from runoff. Appellants secured from Appellees Dr. Greenwood's analyses of water and fish (Appellants' Exhibit 17; R. 512) which shows the water runoff in three places: above rat pen, 0.90 ppm; water runoff on top of hill, 0.52 ppm; Blackfoot pond, runoff northeast of hatchery by Douglas fence, 0.86 ppm. The date of this exhibit shows it was taken in the fall, September 29 and October 10, 1955. The samples were secured under Meader's direction and at the time in the fall when they wanted the analysis; Meader and his attorney then went to Utah State to see the experts. (R. 510-511)

Not once in the record in the Appellees' case is there any positive evidence linking the loss of fish and damage to eggs with an fluoride content of the hatchery waters.

Other than for the testimony of Appellees' Witness Gale, they have relied entirely to establish their case on lay testimony in which the witnesses merely surmise and speculate that emissions of fluorine caused the damage to the trout and trout eggs. The most positive testimony in the record from a lay witness is that of Phil Meader, and his is based entirely upon the fact that he had knowledge of fluorine emissions from the plant:

> "Had it made up that fluorine was causing the trouble * * *." (R. 573-574)

Appellees' Witness Gates testified in a manner typi-

cal of their witnesses when in response to a question as to whether or not he had any idea as to what caused the loss of fish he answered:

> "No, we just had a good idea it was fluorine." (R. 686)

In summary, Dr. Gale, Appellees' only expert witness who took the stand, established two points: 1) That living cells subjected to constant contact with a fluoride level of 3 ppm would have their enzyme system effected; and 2) that a trout subjected to a constant level of 4.5 ppm to 20 ppm of fluorine in soluble water would be adversely effected. With respect to Gale's testimony, there is absolutely no evidence that the cells of trout were subjected to 3 ppm of fluoride or that they were subjected to a constant level of fluoride in water of 4.5 ppm to 20 ppm of fluoride, either in running or still water.

As another conclusive argument that the Appellants' fluoride emissions had no connection whatever with the damage to Appellees' trout and trout eggs, we call the attention of the Court to the fact that the largest discharges of fluorides from the plants were in 1953 and 1954, the discharges being drastically reduced in 1955 and subsequent years. However, when we examine the evidence of Appellees we find that even though the aforesaid condition existed there was little, if any, change in the alleged loss of trout and trout eggs at the Meader Hatchery. Rather than set forth the detailed testimony of Appellees in this regard, we direct the attention of

the Court to pages in the record covering testimony that the trout and trout egg losses in 1953 and 1954 were identical to those in 1955 and 1956: Witness Nelson—R. 341; Warren Meader—R. 474, 477, 478; Witness Gates—R. 642, 675, 686, 688; May Meader—R. 746, 818, 817, 821-840. It is submitted that a reading of the aforesaid transcript references will conclusively illustrate the utter lack of relation between the Appellants' emissions of fluoride in pounds and the alleged loss in Appellees' hatchery.

UNIVERSITY OF IDAHO REPORTS

The technical staff of the University of Idaho was called into the field in the Pocatello area, starting in the spring of 1955 at the request of the citizens of the community, to make a complete fluorine survey and study for the entire area surrounding the plants of the two defendants.

We assume that the Court will accept the survey and the analyses of the State's University, which was cross-checked by Stanford Research Institute, the University being a completely disinterested party from a scientific standpoint, but interested in the welfare of the community.

The first report, that of 1955, is entitled "A Report of a Survey and Analysis for Fluorine Content of Plant Materials and Water Samples Taken in the Pocatello Area During the Summer of 1955." (Exhibit 25)

The second report, that for 1956, is "The Fluorine Content of Plant Materials and Water Samples Col-

lected in the Pocatello Area During the Summer of 1956." (Exhibit 26)

The third report from the University of Idaho is "Fluorine Studies in the Pocatello Area—1957." (Exhibit 27)

The Court will take notice that just the same emphasis was placed upon water as upon plant surveys, and the 1955 report shows, under Number 1, that the first analysis was of water.

The survey was conducted not only to give information concerning fluorine content of vegetation and water but of the atmosphere also.

We attach hereto as an Appendix that portion of the University of Idaho reports concerning water samplings. Exhibits 25, 26 and 27 refer respectively to the years 1955, 1956 and 1957.

With the University of Idaho in the field for the express purpose of making an adequate survey of the entire area for the protection of the public and to ascertain the contamination of vegetation, water and atmosphere by fluorine, Appellees, having introduced the reports, are bound thereby. The University determined and decided in 1955 that *in general the fluorine content of the water was low.* The reports show for each of the years 1955 and 1956 that the same number of samplings were made of the waters in the area for each year, and the samplings were made three times a year, the same as for vegetation.

In 1957 we find this statement:

> "Only a few water samples were analyzed for fluorine because the previous studies in 1955 and 1956 indicated the fluorine content of the waters in the area to be low. The results in Table 3 again show the low fluorine content of water, the only exception being the effluent water from the Simplot plant."

With regard to "effluent water," this was not in issue since it did not reach the Meader property or waters.

Taking for instance Appellees' Exhibit 8, which is one of Food Machinery & Chemical Corporation's reports, we find that the analyses for the first of February 1955, and for the first of March 1955, for the inlet and outlet at the Meader Hatchery, the first of February 1955 shows .5 ppm at the inlet and .6 ppm at the outlet, and for March 1955 .5 ppm at the inlet and .5 ppm at the outlet.

Remembering now that Appellents did not reduce the output of effluents until May of 1955, we find that in June of 1955 the sampling for the Meader waters by the University of Idaho, Exhibit No. 12, shows the first sampling to be .8 ppm, the second .3 ppm, and the third to be .7 ppm.

Again taking the analysis of the University of Idaho for the year 1956, over a year after the combined output of effluents was reduced to 790 pounds, we find the sampling on the Meader property to be as follows: first sampling, 1.1 ppm; second sampling, .8 ppm; third sampling, .5 ppm.

We find the sampling in 1957 to be .3 ppm. The

samplings of the University of Idaho are not only comparable with the samplings as shown by the testimony of Dr. Wohlers, and by the report for the year 1954, but in several instances show a greater parts per million, which rules out any question of the contamination of flowing water on the Meader property by fluoride.

Let us look also at Appellants' Exhibit 17 (R. 512). Dr. Greenwood's analyses of three water samplings at the Meader Hatchery show .90 ppm, .52 ppm and .86 ppm, made September 29, 1955, and October 10, 1955. Both the University of Idaho and Dr. Greenwood show in several instances a higher parts per million than the sampling in 1954, and they show a higher parts per million than the average for all the sample analyses for the year 1953. Also, they show a higher average than the 12 samples from one spring on the Meader property taken in 1953, where the unusual and unexplained sample of 4.7 ppm is reported. The average of the 12 samplings is .5 ppm.

Appellants' Exhibit 17 also shows the analysis of the four samplings of the fish by Dr. Greenwood, analyzed for fluoride content in 1955, both on a wet and dry basis, and showing a range on a dry basis of only 64 ppm to 150 ppm.

Concluding this phase of the argument, the record establishes the low fluorine content of the said water and vegetation in the vicinity of the Meader plant during the years in question. Scientifically, if as Ap-

pellees claim, airborne fluorides were transmitted to their waters, the quantity in the atmosphere necessary to reach the water, if the same were in soluble form, would have been so enormous as to adversely affect every living thing, including human beings, in the area. Such is just not the case, and we defy Appellees to show otherwise to this Court.

H. APPELLEES WHOLLY FAILED TO ESTABLISH THE APPELLANTS MAINTAINED A PRIVATE NUISANCE WITH RESPECT TO APPELLEES' TROUT AND TROUT EGG BUSINESS.

Appellees elected to sue Appellants in this case upon the theory that the latter were maintaining a private nuisance as to the former. The case is not grounded on any theory of negligence. The burden, therefore, is upon Appellees to establish that the plant operations conducted by Appellants constituted a private nuisance as to their hatchery operation. We submit that Appellees have in fact failed to establish that the plant operations constituted a nuisance under any authority or definition of such recognized in law. Reference is made to the authorities cited under this proposition.

The Supreme Court of Idaho has, however, on two occasions involving the operations of Appellant J. R. Simplot Company, in *McNichols v. J. R. Simplot Company*, 74 Idaho 321, 262 P. 2d 1012, and *Koseris v. J. R. Simplot Company*, _____Idaho_____, 352 P. 2d 235, determined the Appellants were and

are engaged in a lawful business, in an industrial area, and recognized by the Supreme Court as such. In the *McNichols* case, supra, the yardstick for determining whether or not a business is in fact a nuisance is set forth, and a reading of this case will disclose that the facts in the instant case fall far short of establishing a nuisance as to these Appellees. We note no claim for damages to Appellees has been made as a result of annoyance from the presence of dust, smoke or fumes from the plant or because of injuries to personal health. The only claim for damages rests in the loss of fish and damage to fish eggs, which as we have pointed out in earlier phases of this brief was not the result of, and could not have been attributable to, the emission of fluorides from Appellants' plants.

As stated in the *Koseris* case, supra:

> "The record amply indicates that the Simplot Company operation, involved in this proceeding, constitutes a lawful business which in nowise can be regarded as a nuisance per se. Rowe v. City of Pocatello, 70 Idaho 343, 218 P. 2d 695; White v. City of Twin Falls, 81 Idaho _____, 338 P. 2d 778; that if it is a nuisance it is per accidens, McNichols v. J. R. Simplot Co., 74 Idaho 321, 262 P. 2d 1012.
>
> * * *
>
> "Applying the theory of the Hansen case to the case at bar, any injunctive relief should not prohibit Simplot Company from conductiong its lawful business; nor prohibit the emission of

dust and fumes beyond the quantity that may be emitted upon reasonable control thereof by installation of up-to-date systems of control; nor beyond what is inherent in the industry when conducted consonant with modern methods."

Being established, therefore, the Appellants were conducting lawful businesses in a lawful manner, it was incumbent upon the Appellees to establish by a preponderance of the evidence that such operations resulted in a private nuisance to them, and this they have wholly failed to sustain. Further, the record shows that Appellants upon being apprised of a possible fluoride problem expended tremendous sums of money in constant improvement of their plants, cooperated with Appellees in all instances, offered assistance, and in the instance of Appellant Food Machinery & Chemical Corporation procured the services of Stanford Research Institute in trying to isolate and identify the problem, if one in fact existed.

I. THE ADMISSION BY THE TRIAL COURT OF CERTAIN DOCUMENTARY EVIDENCE OVER APPROPRIATE AND VALID OBJECTION OF APPELLANTS, AND THE REJECTION BY THE TRIAL COURT OF CERTAIN DOCUMENTARY EVIDENCE OFFERED BY APPELLANTS WAS HIGHLY PREJUDICIAL AND CONSTITUTED REVERSIBLE ERROR.

We submit the trial court erred in two respects in its rulings in connection with Appellees' Exhibits 1

of Appellant Food Machinery & Chemical Corporation dealing generally with the fluorine problem in the area. First, after the exhibits had been marked for identification and after they had been offered in evidence, the court without making a ruling with respect to admissibility permitted Appellees' attorney to cross-examine an executive of Appellant Food Machinery & Chemical Corporation with respect to the specific contents of said documents, this cross-examination being permitted over strenuous and valid objections from Appellants after counsel for Appellees had under the affirmative ruling of the court as aforesaid extracted from said exhibits the material information therefrom. The Court then, again over objection from Appellants, admitted Appellees' Exhibits 1 to 9, inclusive, in evidence. A reading of the record in this respect will disclose said exhibits contained a tremendous amount of immaterial, irrelevant and incompetent matter, opinions and conclusions of the maker of said reports, extremely prejudicial to Appellants. Further, with respect to Appellant J. R. Simplot Company, which company had no opportunity to cross-examine the authors of said reports, the mere admonition of the Court to the jury that such reports were not binding as to the J. R. Simplot Company did not in any way take the sting out of the receipt of this evidence.

We call the attention of the Court to the fact that counsel for Appellant Food Machinery & Chemical Corporation offered to stipulate all the material evidence from said Appellees' Exhibits 1 to 9 in evi-

dence. (R. 906-909). Such offer was rejected since it is obvious that Appellees desired not the material information from the reports but the prejudicial effect thereon with the jury, which, of course, would be emphasized by the admission over strenuous objection of counsel before the jury. The only basis upon which the introduction of said exhibits could be admissible would be on the question of punitive damages, but prior to the admission of said exhibits the Court stated:

> "As the record stands now, there is not going to be any question of punitive damage. When you get into the willfulness and the wantonness, that is out of the picture." (R. 857)

It is submitted that such conduct on the part of the trial court was highly prejudicial to these Appellants and resulted in reversible error.

We further believe that the court erred in admitting Appellees' Exhibit 22 in evidence for the reason that the same was not the best evidence, was a self-serving statement prepared in contemplation of litigation, and was not a business record as ruled by the trial court. The admission of this evidence was highly prejudicial since it dealt with the question of damage and was an element thereof improperly considered by the jury. We believe further the trial court erred in refusing to admit Appellants' Exhibit 35 in evidence since this was a document in the possession of Appellees and which had been given to Appellants by Appellees' counsel pursuant to Appel-

lants' discovery prior to the trial. This evidence contained the results of fluorine sampling taken by an expert in the employ of Appellees and showed no fluorine contamination, which obviously is the reason the admission of the document was objected to by Appellees who systematically and deliberately throughout the entire proceedings withheld material evidence developed by them, all of which negated the possibility of fluorine contamination.

Finally, we ask the Court to consider the trial court's refusal to admit Appellants' Exhibit 20. This was a copy of a letter from a Mr. Drew to Mr. Phil Meader and was offered for one purpose and one purpose only—that is, to impeach the testimony of Phil Meader. It was never offered as truth of the contents therefor, or for any information it contained, but solely to rebut Phil Meader's statement that he had not delivered such letter or a copy thereof to Dr. Wohlers. The court recognized it was offered for impeachment purposes only (R. 1018-1019), but reversed his prior ruling admitting the exhibit (R. 1018) and finally denied its admission. Phil Meader denied ever having given Wohlers the original of the letter or a copy (R. 620), but a proper foundation for receipt by the court of a true and correct copy was laid when Dr. Wohlers stated (R. 1016) that Meader had given to him either the original which he returned after he had made the copy, or Phil Meader had give him the actual copy. It is noted Phil Meader stated he had not ever received such a letter nor had he ever seen it. (R. 619-620) We believe in fairness

we were entitled to impeach Meader's credibility on this point and such impeachment could in fact in the jury's contemplation make all of his testimony suspect.

VII

CONCLUSION

We are convinced that the record in this case is wholly insufficient to justify a jury's verdict for Appellees. Absent any direct testimony or circumstantial proof that there existed a causal connection between Appellants' fluoride emissions and the mortality to Appellees' trout and trout eggs, the court erred in permitting the jury to surmise and conjecture on this basic requirement of a prima facie case for Appellees. In effect the trial court has permitted the jury to take the thinnest of lawsuits and by predicating inference on inference find the Appellants liable.

We submit that the court and jury ignored substantial material, uncontradicted evidence that overwhelmingly established that Appellants did not in the conduct of their plant operations maintain a nuisance toward these Appellees. We earnestly urge that this Court must, upon analysis of the record and the points herein urged, reverse this cause, giving judgments to Appellants without the necessity of a new trial.

Respectfully submitted,

B. W. DAVIS
P.O. Box 1049
Pocatello, Idaho
Attorney for Appellant
Food Machinery & Chemical Corporation

HAWLEY & HAWLEY
P.O. Box 1617
Boise, Idaho

LLOYD E. HAIGHT
P.O. Box 2777
Boise, Idaho
Attorneys for Appellant
J. R. Simplot Company

APPENDIX

From Exhibit 25:

This report covers the following:

1. Analysis of water and forage crop samples for fluorine content.

2. Plant disease surveys: one made by Dr. A. M. Finley during period July 18 to 20, and a second made by Dr. James Guthrie on September 16, 1955.

This report covers a survey made in the Pocatello area during the summer of 1955 to gain information concerning the fluorine content of crops and water supplies. Samples of water and various crops were taken at three different times during the summer of 1955. One sampling was made in June, a second in July, and a third the latter part of August and the first week in September. An attempt was made to correlate the sampling periods with the developmental stage of the crops. The area covered by this survey and the points in the area at which samples were taken are shown in the attached map.

Water samples were taken from various places in the area and analyzed for fluorine. The results are given in Table 2. The sample numbers correspond to the sampling points indicated on the map and a description of the sample is given in the appendix. In general, the fluorine content of the water was low. The only sample which showed an extremely high fluorine content was the sample Number 8 of effluent

water from the Simplot Company plant taken during the first sampling period. The plant was not operating on the second and third sampling dates.

Table 2—Amount of Fluorine Found in Water Samples from Pocatello Area

(Expressed in ppm)

	Sample Periods		
Sample Number	*First*	*Second*	*Third*
3*	0.0	.6	.4
4	.20	0.0	.5
5	.4	.3	.4
6	.6	.2	.9
9	.7	.4	.7
11	.7	.3	.8
12	.8	.3	.7
15	0.0	0.0	.2
1**	.2	.6	.4
2	.2	0.0	.5
7	2.8	2.7	1.2
8	245.0	7.7	6.0
10	12.3	.6	17.0
13	0.0	.2	.2
14	1.7	.5	4.2

*Samples 3, 4, 5, 6, 9, 11, 12 and 15 include well, spring, and canal waters.

**Samples 1, 2, 7, 8, 10, 13 and 14 are Portneuf River and plant effluent samples.

Water samples:

W- 1 Sample was taken from main current of Port-

neuf River at the bridge on the side road which branches southwest from Highway 91 about seven miles southeast from Pocatello city limits.

W- 2 Sample was taken from the main current of the Portneuf River just above bridge on Ross Park Road which branches southwest from Highway 91 about five miles southeast of Pocatello city limits.

W- 3 The sampling place was the Fort Hall main canal east of Highline Road and about .25 mile north of the Pocatello Creek Road-Highline Road junction.

W- 4 Sample was again taken from the Fort Hall main canal on east side of Highline Road and near the intersection of Highline Road and Chubbuck.

W- 5 This water sample was taken from the well on the Tyhee Ranch at the junction of Tyhee Road and Highway 91.

W- 6 Sample came from tap in Lindey's front yard which is on the north side of Highway 30N about .5 miles west of the Westvaco plant.

W- 7 Sample was taken from effluent stream midway between the Simplot and Westvaco plants. This is the effluent from Westvaco before it reaches Simplot.

W- 8 This sample was taken from the effluent stream after it crosses Highway 30N. This is

the effluent just after it leaves the Simplot plant.

W- 9 Sample was taken from cafe directly across the highway from Simplot plant. The water comes from a well which lies approximately 75 yards from the Simplot effluent stream.

W-10 Sample was taken from under bridge on Portneuf River downstream from where Simplot effluent enters river.

W-11 Sample was taken from the main stream of spring at Rowland's Dairy. Spring runs within 10-25 yards of the Portneuf River at this point.

W-12 The sampling place was the spring water near the main building by lower gate of fish hatchery on Meaders' place.

W-13 Sample was taken from the Portneuf River at bridge of Highway 30 about one mile upstream from the entrance of the Simplot effluent.

W-14 This sample was taken from the Portneuf River by rutty road leading over the bluff near west end of Reservation and Tyhee Roads.

W-15 This sample was taken from the tap in the county agent's office in Pocatello.

From Exhibit 26:

During the summer of 1956 a study was again conducted in the Pocatello area to gain information con-

cerning the fluorine content of vegetation, water supplies and the atmosphere. Samples of water and various crops were taken at three different times during the summer: the first sampling was made in June, the second in July, and the third in August. They are covered in this study and the points in the area at which samples were taken are shown in the attached map. The sample numbers correspond to the sampling points indicated on the map and a description of the samples is given in the appendix.

Table 2—Parts Per Million of Fluorine in Water Samples from Pocatello Area

		Sample Periods		
Sample Number	*Type*	*First*	*Second*	*Third*
W-1	river	0.4	0.8	0.5
W-2	river	0.5	0.6	0.3
W-3	river	5.8	0.9	1.0
W-4	river	0.4	0.7	0.3
W-5	effluent	238.0	y	y
W-6	effluent	65.0	1.9	5.0
W-7	effluent	1.5	1.4	1.3
W-8	well	0.8	1.0	0.8
W-9	irrigation	0.4	0.8	0.8
W-10	river	21.8	0.9	0.6
W-11	spring	x	1.6	1.0
W-12	spring	1.1	0.8	0.5

Water samples:

W- 1 Portneuf River, eight miles east of Pocatello.

W- 2 Portneuf River, three miles east of Pocatello where Ross Park Road crosses river.

W- 3 Portneuf River on flat west of the west end of Tyhee Road.

W- 4 Portneuf River at bridge on U.S. 30N one-fourth mile east of Simplot plant.

W- 5 Small canal, 1,000 feet east of Simplot entrance,, effluent water.

W- 6 Small canal, 500 feet east of Simplot entrance, effluent water.

W- 7 Westvaco effluent canal behind Simplot plant, effluent water.

W- 8 Frontier Cafe, across U.S. 30N from Simplot plant, well water.

W- 9 Canal at Highline and Chubbuck Roads, irrigation water.

W-10 Portneuf River at bridge at Chubbuck Road by Swanson Farm.

W-11 Rowland Dairy, three-fourths mile north of Simplot plant, spring water.

W-12 Fish Hatchery, one and one-eighths mile north northeast of Westvaco plant, spring water.

From Exhibit 27:

Only a few water samples were analyzed for fluorine because the previous studies in 1955 and 1956 indicated the fluorine content of the waters in the area to be low. The results in Table 3 again show the low fluorine content of water, the only exception being the effluent water from the Simplot plant.

Table 3—Fluorine Content of Water Samples Taken in Pocatello Area

Sample Number	*Description*	*PPM Fluorine*
W- 2	Portneuf River, three miles east of Pocatello	0.1
W- 3	Portneuf River, at west end of Tyhee	0.6
W- 6	Effluent from Simplot	8.2
W-10	Portneuf River at bridge at Chubbuck Road by Swanson Farm	1.7
W-12	Fish Hatchery-Pond	0.3
W-13		0.5